THE SPEAKER OF DEWAN UNDANGAN NEGERI OF SARAWAK "DATUK AMAR MOHAMAD ASFIA AWANG NASSAR" v. TING TIONG CHOON & ORS AND OTHER APPEALS

COURT OF APPEAL, KUCHING
ABANG ISKANDAR JCA
MARY LIM JCA
HARMINDAR SINGH DHALIWAL JCA
[CIVIL APPEALS NO: Q-01(A)-212-07-2017, Q-01(A)-250-07-2017 & Q-02(A)-1382-07-2017]
27 JULY 2018

CONSTITUTIONAL LAW: *Legislature – State Assembly – Ministerial motion to disqualify assemblyman – Assemblyman acquired Australian citizenship and renounced it prior to election – Whether lost constitutional rights and eligibility to be member of Legislative Assembly of State of Sarawak ('Dewan') under art. 17(1)(g) of State Constitution of Sarawak – Whether Dewan clothed with jurisdiction in admitting motion for consideration and deliberation –Whether Dewan exceeded powers and had no authority to disqualify assemblyman – Federal Constitution, arts. 50(1), (2), 72 & 118 – State Constitution of Sarawak, arts. 16, 17, 18 & 19*

CONSTITUTIONAL LAW: *State Assemblyman – State Legislative Assembly meetings – Ministerial motion to disqualify assemblyman – Assemblyman acquired Australian citizenship and renounced it prior to election – Whether lost constitutional rights and eligibility to be member of Legislative Assembly of State of Sarawak ('Dewan') under art. 17(1)(g) of State Constitution of Sarawak – Whether Dewan clothed with jurisdiction in admitting motion for consideration and deliberation – Whether jurisdiction of Dewan limited to determine disqualification incurred during tenure as elected member of Dewan and not disqualification prior to being elected as member of Dewan – Whether proceeding pertaining to motion conducted without constitutional basis – Federal Constitution, arts. 50(1), (2), 72 & 118 – State Constitution of Sarawak, arts. 16, 17, 18 & 19*

The first respondent, Ting Tiong Choon ('the plaintiff'), a Malaysian citizen of Sarawak origin, acquired Australian citizenship on 20 January 2010. He was also a registered voter in Australia. On 4 April 2016, he renounced his Australian citizenship as per the letter of approval issued by the Australian Government. On 22 April 2016, as part of the nomination process for the State General Election, Sarawak, he affirmed Borang 5A, a statutory declaration to the effect that he had not lost any of his constitutional rights or by any written law pertaining to his eligibility to be a member of the Legislative Assembly of the State of Sarawak ('Dewan'). On 25 April 2016, he was duly nominated as a candidate, together with three others, to contest in the state constituency seat of N74 Pujut and was returned as the winner. On 16 June 2016, Hii King Chong, a defeated candidate, filed an election petition against the plaintiff seeking a declaration that the plaintiff was not

duly elected or ought not to have been returned as he was an Australian citizen. However, the election petition was dismissed and there was no appeal to the Federal Court. Subsequently, on 12 May 2017, the second respondent, Dato Sri Wong Soon Koh, ('second defendant'), a Minister in the Sarawak Cabinet, by way of a Ministerial motion ('MM'), sought to disqualify the plaintiff. The MM was put to a vote and the Legislative Assembly voted 70 to 10 to approve the motion to disqualify the plaintiff. Thereafter, the appellant, the Speaker of the Dewan ('Speaker'), announced that the plaintiff was disqualified under art. 17(1)(g) of the State Constitution of Sarawak ('Sarawak Constitution') and ceased to be a member forthwith. Consequently, the plaintiff filed an originating summons ('OS') in the High Court, wherein the court granted the orders, declaring: (i) the plaintiff's disqualification as a duly elected member of the Dewan for the State Constituency of Pujut (N74) by the Speaker pursuant to the MM moved by the second defendant and adopted by the Dewan and/or the Speaker was null and void; (ii) the disqualification of the plaintiff by the Dewan was against rules of natural justice; and (iii) the disqualification of the plaintiff by the Dewan was in contravention to the Sarawak Constitution particularly art. 17(1)(g) and/or art. 118 of the Federal Constitution ('FC') and thereby held that the plaintiff was not a disqualified person and was entitled to remain as the duly elected assemblyman for N74 Pujut and that there was no vacancy created for the State seat of N74 Pujut. Dissatisfied with the decision, the Speaker appealed. There were three appeals herein (i) Appeal Q-01(A)-212-07-2017 by the Speaker ('Appeal 212'); (ii) Appeal Q-02(A)-1382-07-2017 by the second defendant ('Appeal 1382'); and (iii) Appeal Q-01(A)-250-07-2017 by the Dewan ('Appeal 250'). Essentially, the crux of the case was whether the Dewan was properly clothed with the necessary jurisdiction when it admitted the MM to be considered and for it to be deliberated and resolved by members in passing the MM.

Held (dismissing appeals)
Per Abang Iskandar JCA (for the majority):

(1) A reading of arts. 16, 17, 18 and 19 of the Sarawak Constitution holistically, as opposed to reading art. 17 in isolation, had shown that the disqualifying factors that appear under art. 17 are a constant set of disqualifying factors. Article 18 lists down circumstances which shall put an end to a member's tenure in the Dewan. Article 18 does not derogate anything from art. 17 and just like art. 16, it re-emphasises the special and unique position of art. 17 as the specific provision in the Sarawak Constitution that caters for disqualification of a person from standing in the state election. Article 17(1)(g) has the effect of disqualifying any person from standing in an election and by virtue of art. 18(2)(a), if incurred by a sitting member during the currency of his tenure, it has the like effect of disqualifying an elected member of the Dewan from remaining as an elected member, once he or she ceases to

A be qualified to stand for an election, thereby rendering his or her seat in the Dewan vacant. It is therefore clear that the demarcating line is determined by the point in time when the disqualification is incurred and by whom. (paras 43, 45 & 47)

B **(2)** Article 19 is an enabling provision that gives the Dewan, as a collective body, the necessary jurisdictional basis to decide on the status of an elected member when a question arises in the Dewan as to whether a member has ceased to be qualified for election. It also gives a cloak of finality to the decision that is arrived at by the Dewan. Article 19 therefore gives the Dewan both the jurisdictional basis to determine the C question as was posed in the MM as well as the cloak of immunity to the validity of decision that was arrived at during the proceedings, read with art. 72 of the FC. (para 51)

(3) Articles 16, 17, 18 and 19 of the Sarawak Constitution, read together, have created two separate and distinct regimes in dealing with the issue D of disqualification. Articles 16 and 17 deal with disqualification of a person prior to election or pre-election whilst arts. 18 and 19 deal with disqualification of an elected member post-election. Although the articles do not employ the words such as 'prior' or 'pre-election' or 'post-election', there was nothing wrong in using those words to describe E the plausible effects of the articles read together, in that manner. (para 75)

(4) The operative words used in art. 19(1) and art. 18(2)(a) of the Sarawak Constitution are 'has ceased' and 'ceases' respectively. A plain construction of those words as they are employed in the two articles F must mean that the disqualification must have been incurred by a sitting member, post-election. Those words connote a situation when a member was qualified when he was elected into the Dewan but has since, ceased to be so qualified, as he incurred a disqualification since he was elected. Article 19(1) seeks to clothe the Dewan with the power to G determine whether a 'member' has ceased to be qualified to remain as a member in the Dewan. It does not refer to a 'person'. Article 18(2)(a) again declares that a 'member' ceases to be qualified for election as such a member of the Dewan, when he commits any of the disqualifying acts and that includes voluntarily acquiring a foreign citizenship during his H time as a sitting member of the Dewan. (para 92)

(5) Therefore, the Dewan only has the jurisdiction to determine the status of a 'member' whose alleged disqualification was incurred during the duration of his membership of the Dewan, *ie*, after his election into the Dewan. Article 19 of the Sarawak Constitution gives power to the I Dewan to determine matters pertaining to a member's qualification which may be invoked at any time but the exercise of such power or jurisdiction by the Dewan is limited to the question of whether a

member of the Dewan had ceased to be qualified to be so elected. That meant that the member under scrutiny must have incurred a disqualification during the currency of his tenure as an elected member of the Dewan. It does not warrant the Dewan to extend its jurisdiction to determine an alleged disqualification which was incurred by a member of the Dewan before his election into the Dewan. (paras 93 & 95)

(6) Article 19 of the Sarawak Constitution, in its present form and substance, is not wide enough, in its intended legislative ambit, to successfully anchor a contention in support of an argument that would clothe the Dewan with the necessary jurisdiction to inquire into a disqualification incurred by a sitting member prior to his election into the Dewan. Such a crucial enabling jurisdiction, if indeed was intended for the Dewan to possess, ought to have been provided for expressly and explicitly. It ought not to be left to be inferred from the reading, however creative, of the existing provisions as contained in art. 19 and related articles of the Sarawak Constitution. (para 97)

(7) The plaintiff had committed a disqualifying act as a person under art. 17(1)(g) of the Sarawak Constitution. However, the Dewan did not have the necessary jurisdiction to determine the impugned status of the plaintiff because the disqualification was incurred before he was elected as a member of the Dewan. The language employed in arts. 18 and 19 of the Sarawak Constitution does not confer on the Dewan the necessary jurisdiction to determine and rule on the status of the plaintiff's disqualification. A disqualification based on an act of having voluntarily acquiring a citizenship of a foreign country outside of the Federation of Malaysia can still bite a member, but read with art. 18(2)(a), it must be incurred after he had been elected as a member of the Dewan. (para 99)

(8) In the circumstances, the proceeding in the Dewan on the MM were done without the necessary jurisdiction, as it was clearly of no effect and was null and void. The matter of privilege or immunity under art. 72 of the Federal Constitution did not arise. Further, the issue on denial of natural justice had been rendered academic by reason of the nullity of the proceedings pertaining to the MM which had been conducted by the Dewan without proper constitutional basis. (paras 100, 102 & 104)

Per Harmindar Singh Dhaliwal JCA (concurring):

(1) Article 19(1) of the Sarawak Constitution provides that the decision of the Dewan in respect of a member ceasing to be qualified shall be final. It must follow that such an inquiry by the Dewan as to the question of disqualification of an elected member of the Dewan extends only to a post-election disqualification. This was fortified by the determinative provision in the FC in the form of art. 118. (paras 113-115)

(2) Reference was also made to art. 50(1) and (2) of the FC to advance the proposition that the election of a disqualified person was void in any case and the Dewan was right in its decision to take such action. Such a provision is nowhere to be found in the Sarawak Constitution. Even if it was so found, it would not support the proposition put forward by the first, second and third defendants. Article 50 of the FC must apply to a post-election disqualification because of the operative words 'if a member ... becomes disqualified'. Article 50(2) of the FC would then accordingly apply to make that election void. Any other interpretation would lead to a conflict with art. 118 of the FC. (paras 116 & 117)

(3) Both the FC and the Sarawak Constitution made a distinction between the jurisdiction of the Election Judge after the election process as emphatically set out in art. 118 of the FC and the jurisdiction of Parliament and the State Legislative Assembly after such member is duly elected. The Dewan has the authority to decide only on post-election disqualification on matters which arise after a member has already been elected to the Dewan. Issues pertaining to pre-election disqualification are better dealt with by the Election Judge as provided under art. 118 of the FC read with s. 32(e) of the Election Offences Act 1954. The matters relating to citizenship involve serious legal and constitutional issues. In fact, the defeated candidate, Datuk Hii King Chong, had taken this very issue to the Election Court, wherein a preliminary objection by the plaintiff was upheld and the election petition was struck out. The proceedings here seemed very much like the proverbial second bite of the cherry. (paras 120-122)

(4) Although the business of Parliament and State Legislative Assemblies are immune from judicial interference as provided by art. 72(1) of the FC, the courts will have jurisdiction to intervene if Parliament or the State legislative Assemblies act outside of or exceed its powers as provided under the Federal or State Constitutions. The Dewan had exceeded its powers and had no authority to disqualify the respondent as it did through the MM. (paras 129 & 133)

Mary Lim Thiam Suan JCA (dissenting):

(1) The doctrine of separation of powers between the Executive, Legislative and the Judiciary requires the business of and how the Parliament and the State Legislative Assemblies manage themselves in the conduct of their business, to be immune or protected from judicial interference. The jurisdiction and 'over-riding power' lies with the House, and also the State Legislative Assemblies, to deal with the issue of disqualification and membership of its members. That jurisdiction is inherently part of the principle of parliamentary privilege enjoyed by all Parliamentarians and State Assemblymen (*Fan Yew Teng v. Setia Usaha, Dewan Ra'ayat & Ors*). (paras 200 & 213)

(2) The doctrine of parliamentary privileges is intrinsically part of the doctrine of separation of powers. This doctrine is enshrined in arts. 63 and 72 of the FC; and in the case of the State Assembly of Sarawak, in art. 19 of the Sarawak Constitution. The doctrine of parliamentary privileges means that the House and the State Assembly, as the case may be, and its members, enjoy immunity from judicial interference. The existence of this doctrine of parliamentary privilege is to ensure effective discharge of the functions of the House or the State Assembly by both the House and the State Assembly and its respective members. (para 253)

(3) The matter of membership and the disqualification or loss of membership of the House or the State Assembly is intrinsically related to the management and core or essential business of the House or the State Assembly. Any interference or scrutiny of any decision or related to such decisions of membership or disqualification of membership by the court will undoubtedly, adversely impact or affect the efficient discharge by the members of their parliamentarian functions. The MM was debated and voted upon by the members of the Dewan and the Dewan resolved that the plaintiff is 'disqualified under art. 17(1)(g) of the Sarawak Constitution to be a member and had ceased to be a member of the Dewan Undangan Negeri Sarawak forthwith'. Therefore, the matters raised by the plaintiff were not justiciable and the court would not interfere and would instead, abide by the doctrine of parliamentary privileges. (paras 254-256)

(4) When construing any provision, it is the whole instrument or the whole of the relevant part of the instrument that must be examined in order to discern the meaning intended and to give effect to such intention. The purpose being is to give effect, as far as it is possible, to all its provisions; 'unless there is some clear reason to the contrary, no portion of the fundamental law should be treated as superfluous'. In construing and interpreting the FC, the construction must not be austere, rigid or pedantic. Instead, it should be broader and more generous, suitable to the character of the FC as the supreme law of the nation although respect must be paid to the language used. (paras 260 & 262)

(5) While Malaysia does not recognise dual citizenship, any deprivation of citizenship may only be validly undertaken by the Federal Government pursuant to arts. 24 and 27 of the FC, or if it is voluntarily renounced by the plaintiff himself under art. 23 of the FC. On the contrary, there is confirmative evidence that the plaintiff is a Malaysian citizen. Therefore, the issue of the plaintiff losing his Malaysian citizenship as a result of him voluntarily acquiring Australian citizenship or not being a Malaysian citizen, did not arise.

A However, from the clear terms of art. 16 of the Sarawak Constitution, the qualifications to be a member of the Dewan include the absence of any of the disqualifications stipulated in art. 17 of the Sarawak Constitution. In other words, a citizen aged 21 years or over, who is a resident in the State of Sarawak, may still not be qualified under
B art. 16 of the Sarawak Constitution if that citizen suffers any of the disqualifications spelt out under art. 17 of the Sarawak Constitution. (paras 267 & 268)

(6) The disqualification under art. 17(1)(g) of the Sarawak Constitution arises where the Malaysian citizen is also a citizen of another
C country. The disqualification in art. 17(1)(g) is not concerned only with the acquisition of foreign citizenship by a Malaysian citizen, it also disqualifies any Malaysian citizen who has exercised rights consistent with those afforded or enjoyed by citizens of another country. It further disqualifies any Malaysian citizen who has declared
D allegiance to a foreign country. (paras 277 & 288)

(7) The matter of citizenship in Australia is governed by specific legislation, namely the Australian Citizenship Act 2007 ('the Act'). As an Australian citizen, the plaintiff would have enjoyed the rights of citizenship as mentioned in the Preamble to the Act. At the same time,
E as an Australian citizen, the plaintiff also accepted the obligations mentioned in the Preamble and one of the obligations undertaken was the mandatory pledge of commitment as set out in s. 26 of the Act. The pledge is one of, *inter alia*, loyalty to Australia and its people. Under such circumstances, the plaintiff did not fulfil the qualifications
F under art. 16 of the Sarawak Constitution as he suffered from a disqualification under art. 17(1)(g) and the disqualification was not remediable. (paras 286-291)

(8) In view of the stark absence of provisions for the cessation of disqualification, it would be inappropriate if not wrong for the court
G to read into art. 17(1)(g) a removal of disqualification or even an exemption or cessation of such disqualification. The presence of express removal or cessation of disqualification in art. 17(1)(g) fortified the court's view that the absence of such removal or cessation of disqualification is both deliberate and intended under the Sarawak
H Constitution and the FC. Therefore, the renunciation of the plaintiff's Australian citizenship had no impact whatsoever on the plaintiff's disqualification; the plaintiff remained disqualified by the plain terms of art. 17(1)(g) when he undertook the matters specified in art. 17(1)(g). (paras 303 & 304)

I **(9)** The provisions of qualification, disqualification and the taking of decision on disqualification are matters which must be read as a whole. The whole purpose of these provisions is to ensure that only qualified persons as defined by art. 16 sit as members of the Dewan.

The MM moved on 12 May 2017, taken and carried in the Dewan was not a motion challenging the election of the plaintiff as a member. It was a motion challenging the qualification of the plaintiff to remain as a member; that he ceased to be a member. This was evident from the terms of the MM. Therefore, the court would not examine how the MM was carried. (paras 306 & 307)

(10) The question posed in the MM was a question which inextricably and intrinsically concerned membership of the Dewan. Such a question was well within the mandate, authority, competence and jurisdiction of the Dewan to question and deliberate, regardless when it arose so long as it falls within the terms of art. 17 of the Sarawak Constitution. More so, when the plaintiff was seeking to enjoy and continue to enjoy the privileges of membership of the Dewan. The matters raised in the MM and the impugned decision reached were well and truly internal management matters within the business of the Dewan, taken not even outside its walls but at one of its regular sittings. Consequently, the impugned decision and the Dewan as well as its members, enjoyed parliamentary privilege rendering the matters, therefore, not justiciable. (para 332)

Bahasa Malaysia *Headnotes*

Responden pertama, Ting Tiong Choon ('plaintif'), seorang warganegara Malaysia berasal dari Sarawak, memperoleh kewarganegaraan Australia pada 20 Januari 2010. Dia juga didaftar sebagai pengundi di Australia. Pada 4 April 2016, dia menggugurkan kewarganegaraan Australia menurut surat kelulusan yang dikeluarkan Kerajaan Australia. Pada 22 April 2016, sebagai sebahagian proses penamaan untuk Pilihanraya Umum Negeri Sarawak, plaintif mengikrarkan Borang 5A, akuan berkanun, menyatakan dia tidak kehilangan apa-apa hak perlembagaan atau melalui apa-apa undang-undang bertulis berkenaan dengan kelayakannya menjadi ahli Dewan Undangan Negeri Sarawak ('Dewan'). Pada 25 April 2016, plaintif dicalonkan sebagai calon, bersama-sama dengan tiga yang lain, untuk bertanding dalam kerusi Kawasan Negeri N74 Pujut dan memenangi kerusi tersebut. Pada 16 Jun 2016, Hii King Chong, calon yang tewas, memfailkan petisyen pilihan raya terhadap plaintif memohon deklarasi bahawa plaintif tidak dipilih sewajarnya dan tidak boleh dipilih kerana plaintif warganegara Australia. Walau bagaimanapun, petisyen pilihan raya itu ditolak dan tiada rayuan ke Mahkamah Persekutuan. Kemudian, pada 12 Mei 2017, responden kedua, Dato Sri Wong Soon Koh ('defendan kedua'), seorang Menteri dalam Kabinet Sarawak, melalui usul Menteri ('usul'), memohon penyingkiran plaintif. Usul tersebut diundi dan Dewan Undangan mengundi 70 ke 10 untuk meluluskan usul menyingkir plaintif. Kemudian, perayu, Speaker Dewan ('Speaker'), mengumumkan plaintif disingkir bawah per. 17(1)(g) Perlembagaan Negeri Sarawak ('Perlembagaan Sarawak') dan dengan itu bukan lagi ahli. Berikutan itu, plaintif memfailkan saman pemula ('OS') di Mahkamah Tinggi, dan mahkamah membenarkan perintah-perintah,

A mengisytiharkan: (i) penyingkiran plaintif sebagai ahli Dewan yang dipilih untuk Kawasan Negeri Pujut (N74) oleh Speaker menurut usul yang dimulakan oleh defendan kedua dan diterima Dewan dan/atau Speaker batal dan tidak sah; (ii) penyingkiran plaintif oleh Dewan bertentangan dengan kaedah-kaedah keadilan semula jadi; dan (iii) penyingkiran plaintif oleh
B Dewan bercanggah dengan Perlembagaan Sarawak khususnya per. 17(1)(g) dan/atau per. 118 Perlembagaan Persekutuan dan, oleh itu, memutuskan plaintif bukan seorang yang tiada kelayakan dan berhak kekal sebagai ahli Dewan Undangan yang dipilih bagi N74 Pujut dan tiada kekosongan yang dibentuk untuk kerusi Negeri N74 Pujut. Tidak berpuas hati dengan
C keputusan itu, Speaker merayu. Terdapat tiga rayuan di sini: (i) Rayuan Q-01(A)-212-07-2017 oleh Speaker ('Rayuan 212'); (ii) Rayuan Q-02(A)-1382-07-2017 oleh defendan kedua ('Rayuan 1382'); dan (iii) Rayuan Q-01(A)-250-07-2017 oleh Dewan ('Rayuan 250'). Pada asasnya, inti pati kes adalah sama ada Dewan mempunyai bidang kuasa yang sewajarnya apabila Dewan menerima usul untuk dipertimbangkan dan dibincang dan
D diputuskan oleh ahli-ahli untuk usul itu diluluskan.

Diputuskan (menolak rayuan-rayuan)
Oleh Abang Iskandar HMR (keputusan majoriti):

(1) Membaca per. 16, 17, 18 dan 19 secara holistik, berbanding membaca
E per. 17 secara berasingan, menunjukkan bahawa faktor-faktor ketidaklayakan yang ada bawah per. 17 adalah faktor-faktor penyingkiran tetap. Perkara 18 menyenaraikan hal keadaan yang akan menamatkan tempoh keahlian Dewan. Perkara 18 tidak menjejaskan apa-apa daripada per. 17 dan seperti per. 16, ia menekankan semula
F kedudukan khas dan unik per. 17 sebagai peruntukan spesifik dalam Perlembagaan Sarawak yang memperuntukkan ketidaklayakan seseorang bertanding dalam pilihan raya Negeri. Perkara 17(1)(g) mempunyai kesan menyingkirkan seseorang bertanding dalam pilihan raya dan berikutan per. 18(2)(a), ia diperoleh dalam tempoh sah
G keahlian, ia mempunyai kesan menyingkirkan ahli Dewan yang dipilih daripada kekal sebagai ahli yang dipilih, sebaik sahaja dia tidak lagi layak bertanding dalam pilihan raya, dengan itu menjadikan kerusinya dalam Dewan, kosong. Oleh itu, jelas bahawa garisan pembatasan ditentukan pada masa ketidaklayakan berlaku dan oleh siapa.

H **(2)** Perkara 19 ialah peruntukan membolehkan yang memberi Dewan, sebagai badan kolektif, asas bidang kuasa yang diperlukan, untuk memutuskan status ahli yang dipilih apabila soalan berbangkit dalam Dewan sama ada seseorang ahli kehilangan kelayakan dalam pilihan raya. Ini juga memberikan mantel kemuktamadan untuk keputusan yang
I dicapai oleh Dewan. Perkara 19, oleh itu, memberi Dewan kedua-dua asas bidang kuasa untuk menentukan soalan seperti yang dikemukakan dalam usul dan juga mantel keistimewaan terhadap kesahan keputusan yang dicapai semasa prosiding, dibaca dengan per. 72 Perlembagaan Persekutuan.

(3) Perkara 16, 17, 18 dan 19 Perlembagaan Sarawak, dibaca bersama-sama, membentuk dua rejim yang berbeza dan berasingan dalam menangani isu ketidaklayakan. Perkara 16 dan 17 berkait dengan ketidaklayakan seseorang sebelum pilihan raya atau pra-pilihan raya, manakala per. 18 dan 19 berkait dengan ketidaklayakan ahli yang dipilih selepas pilihan raya. Walaupun perkara-perkara tersebut tidak menggunakan perkataan-perkataan seperti 'sebelum' atau 'pra-pilihan raya', atau 'selepas pilihan raya', tidak salah menggunakan perkataan-perkataan tersebut untuk menghuraikan kesan yang mungkin untuk perkara-perkara itu dibaca bersama-sama, dalam cara itu.

(4) Perkataan tepat yang digunakan dalam per. 19(1) dan per. 18(2)(a) Perlembagaan Sarawak masing-masing ialah 'telah tamat' dan 'tamat'. Pentafsiran jelas perkataan-perkataan itu seperti yang digunakan dalam kedua-dua perkara membawa maksud ketidaklayakan mesti berlaku oleh ahli yang memegang kerusi, selepas pilihan raya. Perkataan-perkataan itu tidak boleh merujuk pada situasi apabila ahli mendapat kelayakan selepas dipilih ke dalam Dewan tetapi kini, tamat kelayakan, kerana dia tiada kelayakan semenjak dipilih. Perkara 19(1) memberikan kuasa kepada Dewan untuk menentukan sama ada 'ahli' yang hilang kelayakan boleh kekal sebagai ahli Dewan. Ia tidak merujuk pada 'seseorang'. Perkara 18(2)(a) sekali lagi mengisytiharkan bahawa 'ahli' menjadi tidak layak untuk pilihan raya kerana ahli Dewan itu, apabila dia melakukan apa-apa tindakan ketidaklayakan dan itu termasuk memperoleh kewarganegaraan asing semasa tempoh memegang kerusi sebagai ahli Dewan.

(5) Oleh itu, Dewan hanya mempunyai bidang kuasa untuk menentukan status 'ahli' yang ketidaklayakannya berlaku semasa tempoh keahliannya dalam Dewan, iaitu, selepas pemilihannya ke dalam Dewan. Perkara 19 Perlembagaan Sarawak memberi kuasa pada Dewan untuk menentukan perkara-perkara berkaitan kelayakan ahli yang boleh dibangkitkan pada bila-bila masa tetapi pelaksanaan kuasa tersebut atau bidang kuasa oleh Dewan terhad pada soalan sama ada ahli Dewan telah berhenti menjadi layak untuk dipilih. Itu bermaksud ahli yang dalam penelitian itu menjadi tidak layak semasa tempohnya memegang kerusi sebagai ahli Dewan yang dipilih. Ia tidak mewajarkan Dewan melanjutkan bidang kuasanya untuk menentukan ketidaklayakan yang dikatakan diperoleh ahli Dewan sebelum pemilihannya ke dalam Dewan.

(6) Perkara 19(1) Perlembagaan Sarawak, dalam bentuk dan isi semasanya, tidak cukup luas, dalam rangkuman perundangan yang diniatkan, untuk mengukuhkan hujahan menyokong pernyataan yang memberi kuasa pada Dewan dengan bidang kuasa perlu untuk mempersoalkan ketidaklayakan yang diperoleh ahli yang memegang kerusi sebelum pemilihannya ke dalam Dewan. Bidang kuasa membolehkan yang

penting seperti itu, jika sememangnya diniatkan untuk dimiliki Dewan, wajar diberikan secara langsung dan jelas. Tidak wajar dibiarkan untuk kesimpulan dibuat daripada pembacaan, walau secara kreatif manapun, daripada peruntukan-peruntukan sedia ada yang terkandung dalam per. 19 dan berkaitan dengan perkara-perkara Perlembagaan Sarawak.

(7) Plaintif telah melakukan tindakan penyingkiran sebagai seseorang bawah per. 17(1)(g) Perlembagaan Sarawak. Walau bagaimanapun, Dewan tidak mempunyai bidang kuasa yang diperlukan untuk menentukan status plaintif yang dipersoalkan kerana ketidaklayakan diperoleh sebelum pemilihannya sebagai ahli Dewan. Bahasa yang digunakan dalam per. 18 dan 19 Perlembagaan Sarawak tidak memberikan Dewan bidang kuasa yang diperlukan untuk menentukan dan memutuskan status penyingkiran plaintif. Ketidaklayakan berdasarkan tindakan memperoleh kewarganegaraan negara asing luar daripada Persekutuan Malaysia secara sukarela masih boleh menjejaskan ahli, tetapi dibaca bersama-sama dengan per. 18(2)(a), ia mesti diperoleh selepas pemilihannya sebagai ahli Dewan.

(8) Dalam keadaan tersebut, prosiding dalam Dewan berikutan usul tersebut dilakukan tanpa bidang kuasa yang diperlukan, kerana ia jelas tiada kesan, terbatal dan tidak sah. Perkara berkaitan hak istimewa atau imuniti bawah per. 72 Perlembagaan Persekutuan tidak timbul. Selanjutnya, isu berkaitan penafian keadilan semula jadi menjadi akademik disebabkan ketaksahan prosiding berkaitan usul itu yang dijalankan Dewan tanpa asas perlembagaan yang wajar.

Oleh Harmindar Singh Dhaliwal HMR (menyetujui):

(1) Perkara 19(1) Perlembagaan Sarawak memperuntukkan keputusan Dewan berhubung ahli hilang kelayakan semestinya muktamad. Berikutan itu, satu siasatan oleh Dewan tentang soalan ketidaklayakan ahli Dewan yang dipilih berlanjut hanya setakat ketidaklayakan selepas pilihan raya. Ini dikukuhkan lagi dengan peruntukan penentu Perlembagaan Persekutuan dalam bentuk per. 118.

(2) Rujukan juga dibuat pada per. 50(1) dan (2) Perlembagaan Persekutuan untuk mengemukakan saranan bahawa pemilihan seseorang yang tidak layak adalah bagaimanapun batal dan Dewan betul dalam keputusannya mengambil tindakan sedemikian. Peruntukan sedemikian tidak didapati dalam mana-mana Perlembagaan Sarawak. Jika ada pun, peruntukan itu tidak menyokong saranan yang dikemukakan defendan-defendan pertama, kedua dan ketiga. Perkara 50 Perlembagaan Persekutuan mesti diguna pakai pada ketidaklayakan selepas pilihan raya kerana perkataan tepat 'jika seseorang ahli … menjadi tidak layak'. Perkara 50(2) Perlembagaan Persekutuan akan terpakai sewajarnya untuk menjadikan pilihan raya tersebut batal. Apa-apa tafsiran lain akan menjurus pada konflik dengan per. 118 Perlembagaan Persekutuan.

(3) Kedua-dua Perlembagaan Persekutuan dan Perlembagaan Sarawak membezakan antara bidang kuasa Hakim Pilihan Raya selepas proses pilihan raya seperti yang sebenarnya dinyatakan dalam per. 118 Perlembagaan Persekutuan dan bidang kuasa Parlimen dan Dewan Undangan Negeri setelah ahli dipilih sewajarnya. Dewan mempunyai kuasa untuk memutuskan hanya berkaitan ketidaklayakan selepas pilihan raya atas perkara-perkara yang berbangkit selepas ahli dipilih ke dalam Dewan. Isu-isu berkaitan ketidaklayakan sebelum pilihan raya wajar diuruskan oleh Hakim Pilihan Raya seperti yang diperuntukkan bawah per. 118 Perlembagaan Persekutuan dibaca bersama-sama dengan s. 32(e) Akta Kesalahan Pilihanraya 1954. Perkara-perkara berkaitan kewarganegaraan melibatkan isu-isu undang-undang dan perlembagaan yang serius. Sebenarnya, calon yang tewas, Datuk Hii King Chong, telah membangkitkan isu sama ke Mahkamah Pilihan Raya di mana bantahan awalan plaintif dikekalkan dan petisyen pilihan raya dibatalkan. Prosiding-prosiding di sini, kelihatan lebih kepada memberi peluang kedua dalam isu yang sama.

(4) Walaupun urusan Parlimen dan Dewan Undangan Negeri kebal daripada campur tangan kehakiman seperti yang diperuntukkan per. 72(1) Perlembagaan Persekutuan, mahkamah mempunyai bidang kuasa untuk campur tangan jika Parlimen atau Dewan Undangan Negeri bertindak luar atau melangkaui kuasa-kuasa seperti yang diperuntukkan bawah Perlembagaan Persekutuan atau Perlembagaan Negeri. Dewan telah melampaui kuasa-kuasanya dan tiada hak menyingkirkan responden seperti yang dilakukannya melalui usul tersebut.

Mary Lim Thiam Suan HMR (menentang):

(1) Doktrin pemisahan kuasa antara Eksekutif, Perundangan dan Kehakiman memerlukan urusan dan bagaimana Parlimen dan Dewan Undangan Negeri melaksanakan urusan, agar kebal atau dilindungi daripada campur tangan kehakiman. Bidang kuasa dan 'over-riding power' terletak pada Dewan Parlimen dan Dewan Undangan Negeri, untuk menangani isu ketidaklayakan dan keahlian ahli-ahlinya. Bidang kuasa itu termaktub sebagai sebahagian prinsip keistimewaan Parlimen yang dinikmati oleh kesemua ahli-ahli Parlimen dan ahli-ahli Dewan Undangan Negeri (*Fan Yew Teng v. Setia Usaha, Dewan Ra'ayat & Ors*).

(2) Doktrin keistimewaan Parlimen wujud sebagai sebahagian doktrin pemisahan kuasa-kuasa. Doktrin ini termaktub dalam per. 63 dan 72 Perlembagaan Persekutuan; dan dalam kes Dewan Undangan Negeri Sarawak, dalam per. 19 Perlembagaan Sarawak. Doktrin keistimewaan Parlimen bermaksud bahawa Dewan Parlimen dan Dewan Undangan Negeri, sewajarnya, dan ahli-ahlinya, menikmati keistimewaan daripada campur tangan kehakiman. Doktrin

keistimewaan Parlimen ini wujud untuk memastikan pelaksanaan berkesan fungsi-fungsi Dewan Parlimen dan Dewan Undangan Negeri oleh kedua-dua Dewan Parlimen dan Dewan Undangan Negeri dan ahli-ahlinya.

(3) Perkara berkenaan keahlian dan ketidaklayakan atau kehilangan keahlian Dewan Parlimen atau Dewan Undangan Negeri nyata berkait dengan pengurusan dan asas atau urusan penting Dewan Parlimen atau Dewan Undangan Negeri. Apa-apa campur tangan atau penilaian apa-apa keputusan atau berkaitan keputusan sedemikian keahlian atau ketidaklayakan oleh mahkamah, tanpa ragu-ragu, akan menjejaskan atau memberi kesan bertentangan terhadap pelaksanaan efisien fungsi-fungsi sebagai ahli parlimen. Usul tersebut telah didebatkan dan diundi oleh ahli-ahli Dewan dan Dewan memutuskan bahawa plaintif 'disqualified under art. 17(1)(g) of the Sarawak Constitution to be a member and had ceased to be a member of the Dewan Undangan Negeri Sarawak forthwith'. Oleh itu, perkara-perkara yang dibangkitkan plaintif tidak boleh diadili.

(4) Apabila mentafsir apa-apa peruntukan, keseluruhan instrumen atau keseluruhan bahagian relevan instrumen itu perlu diperiksa untuk mencerap maksud yang diniatkan dan memberi kesan pada niat itu. Tujuannya adalah untuk memberi kesan, sebaik mungkin, pada kesemua peruntukannya; 'unless there is some clear reason to the contrary, no portion of the fundamental law should be treated as superfluous'. Apabila mentafsir dan menganggapi Perlembagaan Persekutuan, pentafsiran tersebut tidak semestinya serius, tegar atau teliti. Sebaliknya, ia sepatutnya lebih luas, sesuai dengan peranan Perlembagaan Persekutuan sebagai undang-undang tertinggi negara walaupun penghormatan perlu diberi pada bahasa yang digunakan.

(5) Walaupun Malaysia tidak mengiktiraf kewarganegaraan berganda, apa-apa kekurangan kewarganegaraan hanya dianggap sah oleh Kerajaan Persekutuan menurut per. 24 dan 27 Perlembagaan Persekutuan, atau jika ia digugurkan secara sukarela oleh plaintif sendiri bawah per. 23 Perlembagaan Persekutuan. Sebaliknya, terdapat keterangan mengesahkan bahawa plaintif ialah warganegara Malaysia. Oleh itu, isu plaintif kehilangan kewarganegaraan Malaysia kerana memperoleh kewarganegaraan Australia atau bukan lagi warganegara Malaysia, tidak timbul. Walau bagaimanapun, daripada terma-terma jelas per. 16 Perlembagaan Sarawak, kelayakan untuk menjadi ahli Dewan termasuk ketiadaan apa-apa ketidaklayakan yang dinyatakan dalam per. 17 Perlembagaan Sarawak. Dalam erti kata lain, warganegara berumur 21 tahun atau lebih, yang tinggal di Negeri Sarawak masih tidak layak bawah per. 16 Perlembagaan Sarawak jika warganegara itu termasuk dalam ketidaklayakan yang dinyatakan dalam per. 17 Perlembagaan Sarawak.

(6) Ketidaklayakan bawah per. 17(1)(g) Perlembagaan Sarawak timbul apabila warganegara Malaysia juga adalah warganegara negara lain. Ketidaklayakan dalam per. 17(1)(g) tidak berkait hanya dengan pemerolehan kewarganegaraan asing oleh warganegara Malaysia, ia juga menyingkirkan mana-mana warganegara Malaysia yang melaksanakan hak konsisten dengan yang diberikan atau dinikmati oleh warganegara negara lain. Selanjutnya, mana-mana warganegara Malaysia yang mengisytiharkan kesetiaan pada negara asing juga kehilangan kelayakan.

(7) Perkara kewarganegaraan Australia ditadbir oleh perundangan spesifik, iaitu, Australian Citizenship Act 2007 ('Akta'). Sebagai warganegara Australia, plaintif telah menikmati hak-hak kewarganegaraan seperti yang dinyatakan dalam Mukadimah Akta. Pada masa yang sama, sebagai warganegara Australia, plaintif juga menerima kewajipan-kewajipan yang dinyatakan dalam Mukadimah tersebut dan salah satu kewajipan yang diakui adalah janji mandatori komitmen yang disenaraikan dalam s. 26 Akta. Janji tersebut adalah, antara lain, kesetiaan pada Australia dan rakyatnya. Dalam keadaan tersebut, plaintif tidak memenuhi kelayakan bawah per. 16 Perlembagaan Sarawak kerana dia menjadi tidak layak bawah per. 17(1)(g) dan ketidaklayakan itu tidak boleh diremedi.

(8) Berikutan ketiadaan peruntukan jelas untuk penamatan kelayakan, tidak wajar dan salah untuk mahkamah membaca ke dalam per. 17(1)(g) pembatalan ketidaklayakan atau pengecualian atau penamatan ketidaklayakan. Kewujudan pembatalan atau penamatan ketidaklayakan yang jelas dalam per. 17(1)(g) mengukuhkan pendapat mahkamah bahawa ketiadaan pembatalan atau penamatan ketidaklayakan kedua-duanya disengajakan dan diniatkan bawah Perlembagaan Sarawak dan Perlembagaan Persekutuan. Oleh itu, pengguguran kewarganegaraan Australia plaintif tiada apa-apa kesan pada ketidaklayakan plaintif; plaintif kekal tidak layak oleh terma-terma jelas per. 17(1)(g) apabila dia mengakui perkara-perkara yang dinyatakan dalam per. 17(1)(g).

(9) Peruntukan bagi kelayakan, ketidaklayakan dan pengambilan keputusan atas ketidaklayakan adalah perkara-perkara yang mesti dibaca secara keseluruhan. Tujuan menyeluruh peruntukan-peruntukan ini adalah untuk memastikan hanya orang yang layak seperti yang ditakrifkan oleh per. 16 menjadi ahli Dewan. Usul yang dikemukakan pada 12 Mei 2017, dikemukakan dan dibicarakan dalam Dewan bukan usul mencabar pemilihan plaintif sebagai ahli. Usul itu mencabar kelayakan plaintif untuk kekal sebagai ahli; bahawa dia ditamatkan keahlian. Ini jelas daripada terma-terma usul tersebut. Oleh itu, mahkamah tidak akan memeriksa bagaimana usul itu dikemukakan.

A **(10)** Soalan yang dikemukakan dalam usul adalah soalan yang tidak boleh diuraikan dan secara intrinsik berkait dengan keahlian Dewan. Soalan sedemikian terangkum kemas dalam mandat, kuasa, kekompetenan dan bidang kuasa Dewan untuk dipersoal dan dibincang, tanpa mengira bila ia timbul asalkan ia terangkum dalam terma per. 17
B Perlembagaan Sarawak. Lebih-lebih lagi bila plaintif memohon untuk menikmati dan meneruskan untuk menikmati keistimewaan keahlian Dewan. Perkara-perkara yang dibangkitkan dalam usul itu dan keputusan yang dipersoalkan dicapai dalam rangkuman dan sebenarnya perkara-perkara pengurusan dalaman Dewan, tidak
C dibawa keluar Dewan tetapi dalam salah satu persidangan biasa. Berikutan itu, keputusan yang dipersoalkan dan Dewan serta ahli-ahlinya, menikmati keistimewaan Parlimen, menjadikan perkara-perkara tersebut, oleh itu, tidak boleh diadili.

Case(s) referred to:

D *Ah Thian v. Government of Malaysia [1976] 1 LNS 3 FC* ***(refd)***
Andrew Lee Siew Ling v. United Overseas Bank (M) Bhd [2013] 1 CLJ 24 FC ***(refd)***
Bell v. Maryland, 378 US 226 (1964) ***(refd)***
Bradlaugh v. Gossett [1884] 12 QBD 271 ***(refd)***
Consumer Education & Research Society v. Union of India & Others [2009] 8 MLJ 1420 ***(refd)***
Danaharta Urus Sdn Bhd v. Kekatong Sdn Bhd [2004] 1 CLJ 701 FC ***(refd)***
E *Dato Seri IR Hj Mohammad Nizar Jamaluddin v. Dato' Seri Dr Zambry Abd Kadir; Attorney General (Intervener) [2010] 2 CLJ 925 FC* ***(refd)***
Dewan Undangan Negeri Selangor & Ors v. Mohd Hafarizam Harun [2016] 7 CLJ 143 FC ***(refd)***
Dred Scott v. Sanford, 60 US 393 [1856] ***(refd)***
Election Commission of India v. Bajrang Bahadur Singh & Others, Special Leave Petition
F *(Civil) No. 8850 of 2015* ***(refd)***
Election Commission of India v. Saka Venkata Subba Rao, Union of India 1953 SCR 1144 ***(refd)***
Eu Finance Bhd v. Lim Yoke Foo [1982] 1 LNS 21 FC ***(refd)***
Fan Yew Teng v. Government of Malaysia [1976] 1 LNS 28 HC ***(refd)***
Fan Yew Teng v. Setia Usaha, Dewan Ra'ayat & Ors [1975] 1 LNS 39 HC ***(refd)***
G *Howard v. Gossett [1845] 116 ER 139* ***(refd)***
Indira Gandhi Mutho v. Pengarah Jabatan Agama Islam Perak & Ors And Other Appeals [2018] 3 CLJ 145 FC ***(refd)***
Jamil Dzulkarnain v. Mohamad Kamil Shafie [2015] 2 CLJ 1079 CA ***(refd)***
Karupati Maria Das v. Dr Ambedkar Seva Samajan & Ors [2009] 7 SCC 387 ***(refd)***
Lim Cho Hock v. Speaker, Perak State Legislative Assembly [1979] 1 LNS 45 HC ***(refd)***
H *Loh Kooi Choon v. Government of Malaysia [1975] 1 LNS 90 FC* ***(refd)***
Madhuvita Janjara Augustin (Suing Through Next Friend, Margaret Louisa Tan) v. Augustin Lourdsamy & Ors [2018] 4 CLJ 758 CA ***(refd)***
Maunsell v. Olins [1975] AC 373 ***(refd)***
Pembinaan Batu Jaya Sdn Bhd v. Pengarah Tanah dan Galian, Selangor & Anor [2016] 5 CLJ 250 CA ***(refd)***
I *Pandit MSM Sharma v. Shri Sri Krishna Sinha and others And Ors 1959 AIR 395* ***(refd)***

Pengarah Tanah dan Galian, Wilayah Persekutuan v. Sri Lempah Enterprise Sdn Bhd [1978] 1 LNS 143 FC ***(refd)***
Pow Hing & Anor v. Registrar of Titles Malacca [1980] 1 LNS 120 FC ***(refd)***
R v. Chaytor [2010] 3 WLR 1707 ***(refd)***
Re Canavan and Ors [2017] HCA 45 ***(dist)***
Rediffusion (Hong Kong) Ltd v. Attorney General of Hong Kong (PC) [1970] AC 1136 ***(refd)***
Semenyih Jaya Sdn Bhd v. Pentadbir Tanah Daerah Hulu Langat & Another Case [2017] 5 CLJ 526 FC ***(refd)***
Special Reference No. 1 of 1964 AIR 1965 SC 1893 ***(refd)***
Sykes v. Cleary and Others [1992] 176 CLR 77 ***(refd)***
Teng Chang Khim v. Badrul Hisham Abdullah & Anor [2017] 9 CLJ 630 FC ***(refd)***
Teng Chang Khim & Ors v. Dato' Raja Ideris Raja Ahmad & Ors [2014] 3 CLJ 173 FC ***(refd)***
YAB Dato' Dr Zambry Abd Kadir & Ors v. YB Sivakumar Varatharaju Naidu; Attorney-General Malaysia (Intervener) [2009] 4 CLJ 253 FC ***(refd)***
Yang Dipertua, Dewan Rakyat & Ors v. Gobind Singh Deo [2014] 9 CLJ 577 FC ***(refd)***

Legislation referred to:
Constitution of the State of Sarawak, arts. 16, 17(1)(a), (b), (c), (d), (e), (f), (g), (3), (4), (5), (6), (7), 18(1), (2)(a), 19(1), 22, Schedule Part III
Courts of Judicature Act 1964, Schedule r. 1
Dewan UndanganNegeri (Privileges and Powers) Ordinance 2007 (Sarawak) (Cap 65), ss. 3, 5, 7, 10
Elections Act 1958, s. 2
Elections (Conduct of Elections) Regulations 1981, reg. 7(1)
Election Offences Act 1954, ss. 2, 3(e), 38
Federal Constitution, art. 23, 24, 27, 47, 48(1)(e), (f), 49, 50(1), (2), (3), 53(1), 63(1), 72(1), 118, 121
Interpretation Acts 1948 and 1967, s. 17A
Rules of the High Court 1980, O. 18 r. 19(1)

Citizenship Act 2007 [Aus], ss. 26(2), (3), 27, Schedule
Constitution of Australia [Aus], s. 44(i)
Judiciary Act 1903 [Aus], s. 18
The Constitution of India [Ind], arts. 19(1)(a), 21, 32, 190(3), 192(1), (2), 194(3), 212, 226

Other source(s) referred to:
Ahmad Masum, *Parliamentary Privilege and its Practice in Malaysia: An Overview"* [2012] 2 MLJ c-cxviii
Erskine May's Parliamentary Procedure, 17th edn, p 173
Erskine May on Parliamentary Practice, 23 edn, p 46
Suffian FJ's, *An Introduction to the Constitution of Malaysia*, p 55

(Civil Appeals No: Q-01(A)-212-07-2017)
Fot the appellant/1st respondent - Cecil Abraham, Shankar RP & Daniel CL Ling; M/s Thomas, Shankar Ram & Co Advocs
Fot the 1st respondent/plaintiff - Chong Siew Chiang, Tan Kee Heng, Wang King Wei & Michael Kong; M/s King Wei & Co

For the 2nd respondent/2nd defendant - George Lo Kuin Fah, Jonathan Tay Zhi Lun; M/s George Lo & Partners Advoc
For the 3rd respondent/3rd & 4th defendants - Talat Mahmood, Abdul Rashid, Saferi Ali & Evy Liana Atang; SAGs, Kuching
For the 4th respondent/5th defendant - Shamsul Bolhassan & Azizan Md Arshad; SFCs

(Civil Appeals No: Q-02(A)-1382-07-2017)
For the appellant - George Lo Kuin Fah, Jonathan Tay Zhi Lun; M/s George Lo & Partners Advoc
For the respondent - Chong Siew Chiang, Tan Kee Heng, Wang King Wei & Michael Kong; M/s King Wei & Co

(Civil Appeals No: Q-01(A)-250-07-2017)
For the appellant - Talat Mahmood, Abdul Rashid, Saferi Ali & Evy Liana Atang; SAGs, Kuching
For the respondent - Chong Siew Chiang, Tan Kee Heng, Wang King Wei & Michael Kong; M/s King Wei & Co

Reported by S Barathi

JUDGMENT

Abang Iskandar JCA:

Brief Agreed Facts Of The Case

[1] Ting Tiong Choon ("the plaintiff") is a Malaysian citizen of Sarawak origin. He graduated from the University of New South Wales with MBBS in 1992. He acquired Australian citizenship on 20 January 2010. He was also a registered voter in Australia. On 4 April 2016 he renounced his Australian citizenship as per the letter of approval issued by the Australian Government.

[2] As part of the nomination process for the State General Election, Sarawak, he affirmed Borang 5A a statutory declaration on 22 April 2016 to the effect that he has not lost any of his constitutional rights or by any written law pertaining to his eligibility to be a member of the Legislative Assembly of the State of Sarawak ("the Dewan").

[3] On 25 April 2016, he was duly nominated as a candidate together with three others to contest in the state constituency seat of N74 Pujut. On 7 May 2016 he was returned as the winner, having polling 8,899 votes. The margin of victory was 1,759 votes.

[4] On 16 June 2016, Hii King Chong, a defeated candidate filed an election petition against the plaintiff seeking a declaration that the plaintiff was not duly elected or ought not to have been returned. Central to this is the alleged citizenship of the plaintiff being an Australian citizen.

[5] On 14 October 2016 the election judge upheld the preliminary objection by the plaintiff and dismissed the election petition with costs. There was no appeal to the Federal Court against this dismissal of the election petition.

[6] On 4 May 2017 the Director of Criminal Investigation Department PDRM Bukit Aman informed Dato Sri Wong Soon Koh ("the second defendant") by letter that the plaintiff had renounced his Australian citizenship on 4 April 2016 and at that juncture the PDRM have not been able to ascertain whether the plaintiff had exercised any right of citizenship of another country or that the plaintiff had made any declaration of allegiance to any country outside of Malaysia.

[7] On 12 May 2017, one Dato Sri Wong Soon Koh ("the second defendant") a Minister in the Sarawak Cabinet, by way of a ministerial motion ("the MM") sought to disqualify the plaintiff. The said motion was put to a vote and the Legislative Assembly voted 70 to 10 to approve the motion to disqualify the plaintiff. The Speaker announced that the plaintiff was disqualified under art. 17(1)(g) of the State Constitution of Sarawak ("the Sarawak Constitution") and ceased to be a member forthwith.

[8] On 19 May 2017 the Election Commission announced that the nomination of the candidates for the state constituency of Pujut (N74) by election will be on 20 June 2017 and polling will be held on 4 July 2017.

[9] On 7 June 2017, the plaintiff filed the originating summons ("OS") in High Court seeking the following orders:

(i) A declaration that the plaintiff's disqualification as duly elected member of the Dewan Undangan Negeri (DUN) of Sarawak for the state constituency of Pujut (N.74) by the first defendant pursuant to ministerial motion moved by the second defendant dated 12 May 2017 and adopted by the said DUN and/or Speaker in null and void and of no effect for being *ultra vires* the law.

(ii) A declaration that the proceedings and decision taken in the DUN culminating in the disqualification of the plaintiff on 12 May 2017 is not immune from scrutiny by this honourable court.

(iii) A declaration that the disqualification of the plaintiff on 12 May 2017 by the said DUN is against the rules of natural justice.

(iv) A declaration that the disqualification of the plaintiff on 12 May 2017 by the said DUN is in contravention to the Constitution of the State of Sarawak particularly art. 17(1)(g) thereof and/or art. 118 of the Federal Constitution and/or art. 121 of Federal Constitution.

(v) A declaration that the disqualification of the plaintiff can only be made by the way of election petition as provided in the Election Offences Act 1954 which had already been exhausted prior to the decision of the DUN.

A (vi) A declaration that DUN of Sarawak has no power to interpret the law so as to make a finding of facts and law relating to whether the plaintiff is disqualified under art. 17(1)(g) of the Constitution State of Sarawak.

(vii) A declaration that any by-election of the state constituency of Pujut be stayed and postponed until the disposal of this case by this honourable
B court.

(viii) An order that the decision of disqualification of the plaintiff be stayed until the disposal of this case by this honourable court.

(ix) A declaration that the plaintiff is entitled to remuneration, benefits and
C other privileges granted to him under constitution of the state pursuant to Members of the Administration and Members of Dewan Undangan Negeri (Remuneration, Pension and Gratuities) Ordinance 2013.

(x) Damages.

D **[10]** In opposing the OS, the Speaker of Dewan Undangan Negeri of Sarawak, Datuk Amar Mohamad Asfia Awang Nassar ("the first defendant") contended:

(i) The first defendant has not been served personally with the sealed copy of the OS.

E (ii) Standing Order 23(1)(a), 32(12) and 40(1) and art. 17(1)(g) of Sarawak Constitution is referred during the proceedings and the first defendant believed that the matter raised in the motion were matters of primary importance and within the jurisdiction of the Dewan Undangan Negeri of Sarawak ("third defendant").

F (iii) A copy of the motion together with the enclosures were placed on the table of each member of third defendant for deliberation and determination.

(iv) The plaintiff in accordance with rules of natural justice was given ample
G opportunities to address and answer on matters raised in the motion.

(v) The plaintiff refused to answer on (i) whether he has acquired Australian citizenship on 20 January 2010 or (ii) he had exercised the rights as a citizen of Australia by registering as a voter or (iii) he has declared his allegiance to Australia at the time of acquiring his citizenship.

H (vi) The plaintiff also refused to answer pertinent matter in regards of his study, financing and working times in Australia.

(vii) By a vote of majority of 70 votes to 10 votes, the first defendant passed motion by the second defendant and the plaintiff was disqualified under
I art. 17(1) of the Sarawak Constitution as ADUN.

[11] The first defendant also filed encl. 19 to strike out the plaintiff's OS and encl. 21 on the same date to set aside the service of the OS against him.

[12] The grounds of the striking out application are:

(i) Unique to the State Constitution of Sarawak is art. 19 that the matter regarding question that arises whether the Speaker or a member of the DUN has ceased to be qualified for appointment or election as such, the decision of the Dewan shall be taken and shall be final.

(ii) The decision of DUN on 12 May 2017 is within the scope or ambit of art. 17 read with art. 19 of the State Constitution, is final and is not open for the courts to review and in the circumstances the plaintiff's OS is misconceived, frivolous, vexatious and an abuse of the process.

[13] The court allowed the plaintiff's OS for the following orders, namely by declaring (a) that the plaintiff's disqualification as duly elected member of the Dewan Undangan Negeri of Sarawak for the state constituency of Pujut (N74) by the first defendant pursuant to ministerial motion moved by the second defendant dated 12 May 2017 and adopted by the said Dewan Undangan Negeri and/or the Speaker is null and void; (b) that the disqualification of the plaintiff on 12 May 2017 by the said Dewan Undangan Negeri is against rules of natural justice; and (c) that the disqualification of the plaintiff on 12 May 2017 by the Dewan Undangan Negeri is in contravention to the Sarawak Constitution particularly art. 17(1)(g) thereof and/or art. 118 of the Federal Constitution and thereby holding that the plaintiff was not a disqualified person and was entitled to remain as the duly elected Assemblymen for N74 Pujut and that there was no vacancy created for the State seat of N74 Pujut. Costs awarded were made payable jointly and severally by the first and second defendants for the sum of RM100,000. No costs made against third and fifth defendants and the suit against State Government of Sarawak ("fourth defendant") was struck out without any order as to costs.

[14] The learned High Court Judge also ruled that the first defendant's notice of application in encl. 21 to be dismissed with costs of RM1,000. However the first defendant's notice of application in encl. 19 was not considered as it is redundant.

[15] Dissatisfied with the learned High Court Judge's decision, the first defendant now appealed against the said decision to the Court of Appeal *vide* Appeal Q-01(A)-212-07/2017 (Appeal 212), the second defendant appeal is *vide* Appeal Q-02(A)-1382-07/2017 (Appeal 1382), and the third defendant's appeal is *vide* Appeal Q-01(A)-250-07/2017 (Appeal 250).

A

The Appeals

[16] We heard all these three appeals on 26 October 2017. Having heard the submissions by all learned counsel for all parties, we indicated to all learned counsel that we needed some time to consider the submissions placed before us, both oral and written. We also indicated to learned counsel that they would be informed in due course, of our decision, once it was ready to be delivered.

[17] We are now ready to deliver the court's decision. Each of us is going to deliver our own separate decision. I will begin with my decision, followed by my learned brother YA Harmindar Singh Dhaliwal and then my learned sister YA Mary Lim Thiam Suan will deliver her decision. This is now my decision, together with my reasons for the same. As can be seen in the earlier part of this decision, parties are referred to in this decision as they appeared in the High Court before the learned judge, Datuk Primus Douglas Sikayun ("the HCJ").

[18] Now, before the HCJ, the agreed issues to be determined as raised in the High Court had been as follows:

(i) Whether the ministerial motion on 12 May 2017 in respect of the disqualification of the plaintiff related to matters that were within the jurisdiction of the third defendant and whether the matter was justiciable.

(ii) Whether the third defendant acted within its constitutional and legal powers.

(iii) Whether the third defendant had acted in accordance to the principles of natural justice?

(iv) Whether the decisions made on 12 May 2017 by the third defendant are matters and questions within the provisions of the Constitution of the State of Sarawak that is final and cannot be challenged in any court of law.

(v) (a) Whether the plaintiff breached the provisions of art. 17(1)(g) of the Constitution of the State of Sarawak; and

(b) What is the proper interpretation of the provisions of art. 17(1)(g) of the Constitution of the State of Sarawak; and

(c) Whether it is to be read in isolation or with arts. 24 and 27 of the Federal Constitution.

[19] As was alluded to by me earlier the HCJ granted three orders in favour of the plaintiff, which had aggrieved the defendants. Hence these appeals.

[20] There are essentially three areas of discontent among the defendants pertaining to the HCJ's decision, namely first, whether the Dewan had the necessary jurisdiction to pass the MM on 12 May 2017. lf the Dewan had such jurisdiction, then such decision so taken must be final and was further immunised by art. 72 of the Federal Constitution (ie,: the second issue of justiciability.) Thirdly, that it was ruled that there was a breach of natural justice committed by the defendants against the plaintiff during the course of the deliberation of the MM.

[21] Now, it was submitted by Mr Chong Siew Chiang ("Mr Chong"), learned counsel for the plaintiff that the disqualifying factors, including the one as contained under para. (1)(g) to art. 17 of the Sarawak State Constitution, are concerned with pre-election provisions. According to him, these factors can only be determined by way of reference to the election court *vide* the election petition. In other words, that para. (1)(g) has a limited purpose and that its utility is confined to situations that occur during the pre-election stage. As the plaintiff was a member of the Dewan when the MM was filed, it was his contention that the Dewan did not have the jurisdiction to entertain the MM as the disqualification allegedly suffered by the plaintiff was incurred long before the plaintiff got elected as a member of the Dewan. For the Dewan to have jurisdiction in exercise of art. 19(1) of the Sarawak State Constitution over the plaintiff, the disqualification must be incurred after he was elected as a member. It was his contention that for the plaintiff to be disqualified, he must be shown to have ceased to be qualified for election as a member. The same contention was forwarded before the learned HCJ and as could be seen from the HCJ's grounds of decision, such contention put forth by the plaintiff had found favour with the court below.

Deliberation Of Issues

[22] Now, to begin at the beginning, one must have sight of the ministerial motion ('the MM") dated 12 May 2017. It was produced in the High Court during the hearing of the OS of both the plaintiff and the first defendant. It was duly exhibited as exh. DA1 in the affidavit in opposition affirmed by the first defendant, Datuk Amar Mohamad Asfia bin Awang Nassar. This MM was the document that had moved the Dewan to invoke its purported power under art. 19(1) of the Sarawak Constitution. The MM is now reproduced below for convenience:

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MINISTERIAL MOTION

"DA-1"

COMMISSIONER FOR OATHS
NO. Q 119
PHANG DAH NAN
12 JUN 2017
MALAYSIA

DEWAN UNDANGAN NEGERI SARAWAK

ATURAN URUSAN MESYUARAT

PERSIDANGAN HARI KEDUA
MESYUARAT PERTAMA BAGI PENGGAL KEDUA
DEWAN UNDANGAN NEGERI SARAWAK KELAPAN BELAS
JUMAAT, 12 MEI 2017 (15 SYAABAN 1438H)

NOTICE OF MOTION BY MINISTER UNDER STANDING ORDER 23(3)(a) Y.S.I.A.

YB Dato Sri Wong Soon Koh (N.53 Bawang Assan) moves:

"WHEREAS Article 17(1)(g) of the State of Sarawak Constitution states that a person is disqualified from being elected as an elected member of Dewan Undangan Negeri if he has voluntarily acquired citizenship of or exercised rights of citizenship in or has made declaration of allegiance to any country outside the Federation."

"AND WHEREAS by way of Statutory Declaration dated 22.4.2016, Honourable Member for Pujut declared that he has NOT lost the qualification to be elected as ADUN in breach of the Constitution."

"AND WHEREAS Member for Pujut acquired the Australian citizenship on 20.1.2010."

"AND WHEREAS Member for Pujut declared his allegiance to Australia at the time of acquiring the citizenship."

"AND WHEREAS Member for Pujut exercised his rights as a citizen by registering as a voter with the Australian Electoral Commission."

"AND WHEREAS Member for Pujut was declared bankrupt twice in Australia."

"AND WHEREAS Member for Pujut is completely unqualified, unfit and untrustworthy individual to be nominated and elected to represent the people of Sarawak."

"AND WHEREAS as a result of his voluntary acts, Member for Pujut has ceased to be member of Dewan Undangan Negeri Sarawak due to the breaches of Article 17(1)(g) of the Constitution."

THEREFORE IT IS MOVED THAT THIS HOUSE HEREBY RESOLVES THAT:-

"Member for Pujut is disqualified under Article 17(1)(g) of the State of Sarawak Constitution to be a member and has ceased to be a member of the Dewan Undangan Negeri Sarawak forthwith."

[23] Looking at the MM, it was stipulated that the member in question for N74 Pujut, who is the plaintiff, was disqualified by virtue of art. 17(1)(g) of Sarawak Constitution.

[24] The MM was deliberated in the Dewan and thereafter, the MM was put to the floor for a vote by the elected members present in the Dewan. The MM was carried by a majority of 70:10 in favour of the MM. The first defendant, as the Speaker, then declared that pursuant to art. 17 of Sarawak Constitution, the plaintiff's seat P74 Pujut was rendered vacant. I will have occasion to refer to this MM again in the course of this decision.

[25] The Election Commission then set a date for a by-election for N74 Pujut for the purpose of filling up the vacancy created by the disqualification of the plaintiff as the member for N74 Pujut, by the Dewan.

[26] The plaintiff then filed a suit at the Kuching High Court by way of OS seeking basically to nullify the order of disqualification against him by the Dewan. The decision of the Kuching High Court was delivered and as could be seen, the decision clearly had not appeased the defendants. The Election Commission was cited as a nominal defendant.

[27] Having considered the submissions by all learned counsel, I shall now deal with the issue on the jurisdiction of the Dewan, which has been aptly described by the learned State Attorney General ("SAG") Datuk Talat Mahmood as the "Interpretation of the Constitution Issue". This issue pertains to the issue of whether the Dewan had the necessary jurisdiction to determine the matter that was raised in the MM and placed before it on 12 May 2017. This issue to me is key in the determination of these appeals one way or the other. The need to consider the other issues on the 'privilege issue' and the issue of the complaint by the plaintiff that centered on the denial of natural justice that was perpetrated against him during the deliberation of the MM at the Dewan hinges on the outcome of how this issue on the Dewan's jurisdiction will be decided.

The Jurisdiction Issue

[28] Essentially, the crux of this case is whether the Dewan was properly clothed with the necessary jurisdiction when it admitted the MM on 12 May 2017 to be considered and for it to be deliberated and resolved by members in passing the MM. All the defendants submitted before us that the Dewan was well within its constitutional power to undertake that exercise on 12 May 2017. As such, it was their submissions that as the proceedings pertaining to the MM related very much to their core business as a legislative body under the Sarawak State Constitution, all the proceedings ought to be covered by the immunity as provided under art. 72 of the Federal Constitution.

[29] It was one of the key arguments advanced by the defendants that the disqualification with which the plaintiff was concerned had centred on art. 17(1)(g) of the Sarawak Constitution, namely for having voluntarily acquired a foreign citizenship of country outside of the Federation of Malaysia, *to wit*, the Australian citizenship. According to the defendants, this disqualification under art. 17(1)(g) is a disqualification of such a nature which is not removable or redeemable, unlike other disqualifications listed under art. 17(1). Paragraph (3) to art. 17 was referred to and it was submitted to us that para. (3) did not forgive a person similarly circumstanced as the plaintiff. In the context of para. (3) a foreigner who becomes a Malaysian citizen is not disqualified despite what he did before he becomes a Malaysian citizen. With respect I agree with the defendants' contention on this issue. Paragraph (3) to art. 17 clearly omits any reference to a person who commits a disqualification act premised on para. (1)(g) to art. 17. For instance, there was no reference to a subsequent act of renunciation of the voluntarily acquired foreign citizenship, as a redeeming element to a commission of a disqualifying act by a person under para. (1)(g) to art. 17. The facts in these appeals clearly showed that the plaintiff was a Malaysian citizen before he allegedly committed the disqualifying act under art. 17(1)(g) of the Sarawak State Constitution. Then, subsequently, he had purportedly renounced that foreign citizenship, after which he stood for the N74 Pujut seat during the

A State Election in 2016 and was returned as the winner. So, he was not a foreigner that was envisaged under para. (3) of art. 17. With respect, to my mind, the foreigner envisaged under para. (3) was a foreigner, *simpliciter*, for instance, a British citizen, who was never a Malaysian citizen before he became a British citizen. As alluded to earlier, I am with the defendants on
B this issue, in that the plaintiff was a disqualified person by operation of para. (1)(g) of art. 17 of the Sarawak State Constitution. Clearly the plaintiff was not a person envisaged by art. 17(3) who could find solace in its benevolent embrace.

[30] The defendants went on to submit that such a disqualification under
C art. 17(1)(g) is in the nature of a continuing one, such that he brought the disqualification with him into the Dewan upon his election and as such, the Dewan had rightly dealt with him by way of passing the MM dated 12 May 2017. It was the defendants' case that the Dewan's exercise of art. 19(1) was justified as it had the necessary jurisdiction to determine the status of a person
D like the plaintiff, by looking at an act of disqualification that was incurred by that person long before he was elected as a member of the Dewan.

[31] That basically would summarise the position of the defendants on the jurisdiction issue. The learned SAG had submitted that a purposive approach should be employed to enable the Dewan to deal with a person like the
E plaintiff who was disqualified long before his election and that his disqualification is a continuing one. The plaintiff brought the disqualification with him into the Dewan as a member and on account of that, it was the defendants' submissions that the Dewan had the necessary jurisdiction by virtue of art. 19(1) to determine his status as a member and once decided,
F it was final. Then art. 72 of the Federal Constitution would creep in to clothe it with immunity. This had formed the bone of contention between the litigating parties, namely could the Dewan, in a purported exercise of art. 19(1) of the Sarawak State Constitution, determine a disqualification that was incurred by the plaintiff which was admittedly incurred prior to his
G election as a member of the august Dewan?

Construing A Constitution: Some Salient Pointers

[32] Clearly, I am in the midst of having to interpret arts. 16, 17, 18 and 19 of the Sarawak Constitution and of course some other provisions in other legal documents of similar significance, in order to come to a proper
H construction as to their meanings and intention, taken holistically.

[33] In attempting to construe a Constitution, several points need to be borne in mind. It has been opined that the manner in which to construe a constitutional provision is not exactly the same way as one would interpret
I an ordinary statute. In that regard, it is safe to pay heed as to how the justices of the Supreme Court in the USA have approached the issue when faced with the task of having to construe the provisions in their own Constitution. The utmost principle that they have been following has been to capture and honor the intent of the framers of the Constitution.

[34] Justice Goldberg wrote his opinion for the US Supreme Court in the reported case of *Bell v. Maryland*, 378 US 226 (1964) which contained the following words, "Our sworn duty to construe the Constitution requires ... that we read it to effectuate the intent and purposes of the framers." In fact, as early as in 1857, Chief Justice Roger Taney speaking for the US Supreme Court in the case of *Dred Scott v. Sanford*, 60 US 393 (1856) in employing the same approach to constitutional construction, had this to say:

> Any other rule of construction would abrogate the judicial character of this court, and make it the mere reflex of the popular opinion or passion of the day.

[35] In our Federal Court case of *Loh Kooi Choon v. Government of Malaysia* [1975] 1 LNS 90; [1977] 2 MLJ 187 Raja Azlan Shah FJ (as His Majesty then was) had occasion to say the following:

> Whatever may be said of other Constitutions, they are ultimately of little assistance to us because our Constitution now stands in its own right and it is in the end the wording of our Constitution itself that is to be interpreted and applied, and this wording "can never be overridden by the extraneous principles of other Constitutions. see - *Adeqbenro v. Akintola & Anor* [1963] 3 All ER 544 551. Each country frames its constitution according to its genius and for the good of its own society ..."

[36] The point to stress here is that, every country's Constitution is unique and in most instances, it represents not only the supreme law of the land but more meaningfully, it represents an encapsulation of the national aspirations of the country's collective populace. In the *Low Kooi Choon*'s case (*supra*) learned Justice Raja Azlan Shah did not end there. His Lordship had gone on to say:

> We look at other Constitutions to learn from their experiences, and from a desire to see how their progress and well-being is ensured by their fundamental law.

[37] While they may not be necessarily binding on us, useful guides may be derived from the manner courts in other jurisdictions interpreted their Constitutional provisions, which may be similar, though not exactly in *pari materia* with ours, in which case their persuasive value ought not to be ignored completely.

[38] Reverting to the instant appeals before this court, I am of the view that all parties in these appeals are in agreement that arts. 16 and 17 basically are concerned with the qualification and disqualification of a person who would be qualified or otherwise from standing in a State election to be a member in the Dewan Undangan Negeri Sarawak. This would form the pre-election regime, so to speak. It was the plaintiff's stand that matters that are determined or to be considered in these two articles are to fall within the purview of the election court. Article 118 of the Federal Constitution provides as follows:

A Method of challenging election

118. No election to the House of Representatives or to the Legislative Assembly of a State shall be called in question except by an election petition presented to the High Court having jurisdiction where the election was held.

B **[39]** Section 32 of the Election Offences Act 1954 (Revised 1969) stipulates as follows:

32. Avoidance of election on election petition

The election of a candidate at any election shall be declared to be void
C on an election petition on any of the following grounds only which may be proved to the satisfaction of the Election Judge:

(a) ...

(b) ...

D (c) ...

(d) ...

(e) that the candidate was at the time of his election, a person disqualified for election.

E **[40]** Then, there are arts. 18 and 19 which are concerned with the disqualification of a sitting member of the Dewan. These two articles are concerned with disqualification of a sitting member of the Dewan by the Dewan, upon a question being asked, not unlike what the MM had proposed to do. This regime is also recognised in the judgment of Mohd Azmi J in the case of *Fan Yew Teng v. Setia Usaha, Dewan Ra'ayat & Ors* [1975] 1 LNS 39;
F [1975] 2 MLJ 40 where Mohd Azmi J had this to say:

Thirdly, it is also essential to bear in mind that, unlike the constitution of some countries with parliamentary system of government, our Constitution does not confer on the House of Representatives, the power to decide elections in dispute, but only question relating to the
G disqualification of members. In the case of an election to the House of Representatives, the question of pre-election disqualification including the question of an election on the ground of disqualification of a candidate is given to the High Court under art. 118 and if the disqualification is established, the election shall be void under art. 50(2).

H **[41]** It was also referred to with approval in the academic work by Ahmad Masum in his article entitled "*Parliamentary Privilege and its Practice in Malaysia: An Overview*" [2012] 2 MLJ c-cxviii which also cited Mohd Azmi's decision as basis for so finding. In his article, Ahmad Masum expressed the following view at p. cvi:

I Regardless of the implication of art. 53(1) of the Federal Constitution it is of immense importance to note that there are several exceptions to this rule. For example, art. 53(1) applies only to postelection or post appointment disqualification. Hence, the Houses are the sole determinant

of the question of whether an MP, already elected to the Dewan Rakyat, or a Senator already elected or appointed to the Dewan Negara, is eligible to continue to sit in the House.

[42] This art. 53(1) of the Federal Constitution is similar to art. 19(1) of the Sarawak Constitution. To my mind, those articles are concerned with a supervening disqualification, meaning a disqualification that was incurred by a member after he was elected into the august Dewan or either Houses of Parliament. The learned High Court Judge in the High Court was correct when he said that Justice Mohd Azmi's decision in *Fan Yew Tang*'s case *(supra)* was never disturbed by any subsequent decisions of either the Court of Appeal or the Federal Court. I too would agree with what was said by Mohd Azmi Jin *Fan Yew Teng*'s case (*supra*). In respect of Sarawak, art. 18(2) of the Sarawak State Constitution lists out the disqualifying acts which will end the tenure of a sitting member. I have no difficulty in stating that one of these disqualifying acts would be an act by a sitting member, *inter alia*, of having voluntarily acquired citizenship of a country outside of the Federation of Malaysia.

[43] To my mind, a reading of arts. 16, 17, 18 and 19 of the Sarawak State Constitution holistically by me, as opposed to reading art. 17 in isolation, had shown that the disqualifying factors that appear under art. 17 are a constant set of disqualifying factors. I say so because the ensuing art. 18 that provides for the tenure of a member of the Dewan, as was the plaintiff, lists down circumstances which shall put an end to a member's tenure in the Dewan. Article 18(1) states that the dissolution of the Dewan shall automatically end a member's tenure in the Dewan, for obvious reasons. In addition to that, art. 18(2) lists down other circumstances that would also put paid to a member's tenure in the Dewan. In that regard, para. (2)(a) to art. 18 refers specifically to the disqualifying factors which would have the effect of ceasing a member's qualifying status, thereby ending his tenure as an elected member in the Dewan. In fact, that para. (2)(a) to art. 18 reads:

(2) An elected member shall also vacate his seat in the Dewan if:

*(a) he ceases to be qualified for election as such a member of the Dewan;

[44] It is noted by me that there are other factors, as listed under art. 18 that have the effect of rendering the seat of a member to be vacant. One example of such circumstances is when the member is "absent without the leave of the Speaker from every sitting of the Dewan for three consecutive meetings." This circumstance does not appear in art. 17, also for obvious reasons. But what is key here is that the disqualifying circumstances under art. 17(1) are retained and kept in play by virtue of art. 18(2)(a) such that he shall, *inter alia*, vacate his seat if he commits an act as envisaged by the operative words of para. (1)(g) to art. 17, namely when he voluntarily acquired a citizenship of a country outside of the Federation of Malaysia. In that regard, it would not be entirely wrong for one to say that the very essence, indeed if not the entire body of para. (1) to art. 17 has been

A transplanted or imported into art. 18(2)(a) by clear and explicit expression. It therefore lives and resides within the embrace of art. 18(2)(a) throughout the span of a member's tenure until it is invoked, with a view to terminate his tenure, as a member of the Dewan. It does not escape my observation as well that the language that is employed under art. 18(2)(a) is unambiguous
B as to its intent, in that it does not single out any disqualifying factor for exemption, from its application, in particular para. (1)(g) of art. 17.

[45] So, to recap, in as much as para. (1) to art. 17 may be argued, as did the learned counsel for the plaintiff, seeks to provide for a pre-election disqualification regime, I am nevertheless of the considered view that the
C same provisions therein are very much relevant as grounds to disqualify a sitting member of the Dewan, so as to render his seat vacant, in circumstances as provided for under art. 18(2)(a). As such, I am of the considered view that a disqualification based on the provision as contained under para. (1)(g) to art. 17 is a relevant consideration that is applicable to
D a person prior to an election as well as to an elected member of the Dewan, namely post-election.

[46] To dispel any lingering doubt, I state that a voluntary acquisition of citizenship of a country outside the Federation of Malaysia is a disqualifying factor, both at the pre-election as well as at the post-election stages. It would
E stand to reason that an elected member must always remain a qualified person after his or her election, until the Dewan is dissolved. But he shall vacate his or her seat, during the duration of his tenure as a member of the Dewan, once he or she loses the qualifying factor, or in other words, once he or she ceases to be so qualified to be elected. Article 16, if it is to be
F recalled, specifically says the disqualifying factors are housed under art. 17. As can be seen under art. 18, there are additional grounds that are provided for ending the tenure of an elected member of the Dewan.

[47] In my considered view, art. 18, does not derogate anything from art. 17 and just like art. 16, it reemphasises the special and unique position
G of art. 17 as the specific provision in the Sarawak Constitution that caters for disqualification of a person from standing in the State election. Article 18 only acts to add to the list of disqualification *vis-a-vis* an elected member. In any case, para. (1)(g) to art. 17 remains a constant. As earlier stated, it has the effect of disqualifying any person from standing in an election and by
H virtue of art. 18(2)(a), if incurred by a sitting member during the currency of his tenure, it has the like effect of disqualifying an elected member of the Dewan from remaining as an elected member, once he or she ceases to be qualified to stand for an election, thereby rendering his or her seat in the Dewan vacant. It is therefore clear that the demarcating line is determined
I by the point in time when the disqualification is incurred and by whom.

[48] It was also quite central to the contention of the plaintiff's learned counsel that the only way in which an elected member of the Dewan could be challenged as to his election, must be by way of filing an election petition.

Article 118 of the Federation Constitution of Malaysia was cited in support. While I agree that an election petition could be used to nullify the result of an election, it must be noted that the Sarawak Dewan, just like the federal legislative body, has been empowered by the respective Constitution, to decide on the issue pertaining to the disqualification of any of its members, including the Speaker (in the case of Sarawak) in the sense that he could have ceased to be so qualified for election. In the case of Sarawak, the relevant provisions are contained under art. 19 of the Sarawak State Constitution. In fact, the said art. 19 stipulates further that when such a question is raised before the Dewan, any 'decision of the Dewan shall be taken and shall be final'.

[49] Now, art. 19 of the Sarawak Constitution is a huge provision. I reproduce art. 19 for ease of reference:

> 19. If any question arises whether the Speaker or a member of the Dewan Undangan Negeri has ceased to be qualified for appointment or election as such, the decision of the Dewan shall be taken and shall be final.

[50] There is a proviso to this art. 19 but it is not significantly relevant in the context of the present discussion.

[51] This art. 19 is an enabling provision that gives the Dewan, as a collective body, the necessary jurisdictional basis to decide on the status of an elected member when a question arises in the Dewan as to whether a member has ceased to be qualified for election, as such. Another significant feature about this art. 19 is that it gives a cloak of finality to the decision that is arrived at by the Dewan. At face value, by itself, it would appear to me that such decision that is taken by the Dewan, pursuant to an exercise undertaken by virtue of art. 19 of the Sarawak State Constitution is final. Read together with art. 72 of the Federal Constitution, such a decision is one that is not justiciable, meaning it cannot, by reason of the constitutional provision, be dragged to any court of law for potential curial judicial scrutiny. Article 19 therefore gives the Dewan both the jurisdictional basis to determine the question as was posed in the ministerial motion as well as the cloak of immunity to the validity of decision that was arrived at during the proceedings, read with art. 72 of the Federal Constitution.

[52] Disqualification, just like qualification, is as much a factual consideration as it is a legal consideration. It can be very much a fact-sensitive scenario. As such, it may not be a cut and dry issue.

[53] Reverting to this case, the disqualification of the plaintiff revolved on the issue pertaining to para. (1)(g) of art. 17 of the Sarawak State Constitution. Simply put, that involves the voluntary acquisition of foreign citizenship by the plaintiff.

[54] The critical question, in relation to art. 19(1), to my mind that needed to be addressed and be answered has become, when, in point of time was the alleged disqualification incurred, in relation to the plaintiff, as a member of the Dewan? The answer to that question would determine whether art. 19(1) could be triggered by the Dewan?

[55] The learned counsel for the plaintiff had submitted before us that, that factum occurred well before the election. The agreed facts in the High Court showed that it happened in 2010. That would necessarily mean that it occurred well before the election in 2016. As such, it was a disqualifying factor that existed prior to the election. It was a factual circumstance that was envisaged under art. 17(1)(g). As such, it was a matter that must fall squarely within the exclusive purview of the election court, in which case, according to Mr Chong, any complaint in relation to it must be brought by way of an election petition. As was alluded to earlier, art. 118 of the Federal Constitution was cited to support his proposition to that effect. In these appeals before us, as alluded to in the facts it was not disputed that the vanquished candidate for the N74 Pujut State seat in the 2016 State elections did file in an election petition with a view of challenging the result of the said election in N74 Pujut in favour of the plaintiff. Somehow, the merits of the said petition did not see the light of day in the election court because the election judge allowed a preliminary objection that was raised by the plaintiff which effectively knocked out the said petition. There was no appeal against that decision of the election judge which had allowed the preliminary objection of the plaintiff. As is trite, by not appealing, the petitioner must be deemed to have accepted the adverse result to be the truth on the matter. According to Mr Chong, that ought to end all matters. To him, the Dewan did not have the jurisdiction to determine the plaintiff's status as a member of the Dewan, under the then existing circumstances pertaining to the plaintiff's case.

[56] Viewed in another way, the acquisition of the citizenship of Australia did not happen after the plaintiff was elected as a member of the Dewan. In other words, it cannot be caught by the phrase 'has ceased to be qualified' for election as such, under art. 19(1). This phrase, it was submitted by Mr Chong, presupposes a situation whereby the member under scrutiny has been perfectly qualified under art. 16 when he was elected, but has, since his election as a member of the Dewan, lost his qualification, thus the use of the phrase, 'has ceased to be qualified for election as such' under art. 19(1).

[57] All learned counsel for the all the defendants were of the view that the disqualification with which the plaintiff was blighted with was one of a continuous kind and that the Dewan was well poised, by virtue of art. 19(1) of the Sarawak State Constitution to determine the question posed in the MM dated 12 May 2016.

[58] The learned SAG in para. 24 of his written submission dated 19 October 2017 on this issue had this to say: A

> 24. In view of the wording of arts. 50(1) and 53(1), it is clear that they refer to a situation where a Member of Parliament has **become disqualified from membership. That refers to post election scenario**. But under art. 19(1) of the State Constitution, the Dewan is empowered to make a final decision **whenever a question should arise**. As to whether a member shall continue as a member when he has been disqualified under art. 17(1)(g) for election to the Dewan. Otherwise, where the Dewan's attention is drawn, subsequent to an Election, that any particular member did not have the qualification to become an elected member of the Dewan there does not appear to be any mechanism for the Dewan to determine the question of their person's continued membership of the Dewan when he or she declines to vacate the seat. This would be serious lacuna in the Constitution. Thus art. 19(1) ought to be give a **purposive interpretation to enable the Dewan to have jurisdiction to determine, whenever a question arises**, as to whether any person should vacate his seat under art. 18(2) as he is not qualified for election to the Dewan for any of the reasons enumerated in art. 17(1). (emphasis added)

B C D

[59] At the outset, let it be placed on record that I had found that all the submissions by all able and learned counsel for all parties on this issue, to be nothing short of compelling.

E

[60] In the course of my research, I had occasion to look at the Constitution of the State of Perak ("the Perak Constitution") in Peninsular Malaysia. I noted that it had provisions that provided for the qualification and disqualification for a person for election. It also had provisions for the disqualification of elected member of the Dewan. In a sense, it provided for a pre-election and post-election regime. F

[61] But there was one provision in the Perak Constitution which I could not find in the Sarawak State Constitution. I reproduce below, that provision in the Perak Constitution, which resides in art. XXXIV "Effect of disqualification and prohibition of nomination without consent" which reads as follows: G

> (1) If a member of the Legislative Assembly becomes disqualified for membership of the Assembly, his seat shall become vacant.
>
> (2) If a person **is disqualified** for being a member of the Legislative Assembly **is elected to the Assembly**, or if an election is contrary to art. XXXIII, **the election shall be void**. H
>
> (3) If the election of any person would or might be void under Clause
>
> (2) his nomination for the election shall be void. (emphasis added)

I

[62] In fact, a similar provision to art. XXXIV above, appears in art. 50(2) of the Federal Constitution. It reads:

> (2) If a person disqualified for being a member of the House of Representatives is elected to that House or if a person disqualified for being a member of the Senate is elected or appointed to the Senate or if an election or appointment to either House is contrary to art. 49, the election or appointment shall be void.

[63] My take after reading of the Perak Constitutional provisions is that art. XXXIV therein, provides for three very important provisions. First, it says that if a member of the Assembly becomes disqualified for membership of the Assembly, his seat falls vacant. The word 'becomes' connotes a supervening event that happens after the person who is properly qualified is validly elected as a member of the Perak State Assembly. It means that during his tenure as a member of the Perak State Assembly, he incurs the disqualification. Secondly, it makes it very clear that if a person had been wrongly elected as a member of the Perak State Assembly, when in fact he is disqualified from standing for election, then that art. XXXIV renders his purported election to be void by operation of law. It even goes further back in time to void the nomination of the disqualified person. In other words, the question of a person circumstanced as the plaintiff shall have his election be declared as void as a matter of law, both in Perak and in the Federal Parliament.

[64] I would describe provisions of this kind, as a 'purging regime', for want of a better terminology, in that it makes sure that only qualified persons got elected into the Perak State Assembly and that if a person who, despite his disqualification, gets elected as a member of the Perak State Assembly and it was later discovered that he is actually a disqualified person, then his election, shall be void. In other words, his seat will be rendered vacant. That regime also exists in our Federal Parliament courtesy of art. 50(2) of Federal Constitution.

[65] In the absence of such an express provision in the Sarawak Constitution, can the Dewan undertake such an exercise pertaining to the MM dated 12 May 2017 within the ambit of arts. 18(1) and 19(1)?

The Australian Experience

[66] When this appeal was being argued before us, in Australia, a legal battle was afoot which was concerned with the question of dual nationality or dual citizenship amongst her ruling as well as the opposition politicians. The burning issue at hand was whether a person of dual citizenship could, under the Australian Constitution, be eligible to be elected as Members of Parliament and/or as Senators of the Australian Parliament. The legal tussle ended with the High Court of Australia coming out with the decision that only citizens of Australia are eligible to stand and capable of standing for election as Members of Parliament and as Senators.

[67] In an earlier decision by the High Court of Australia in the case of *Sykes v. Cleary and Others* [1992] 176 CLR 77 ("*Sykes* case") *via* the speech by Brennan J with regard to s. 44(i) of the Constitution of Australia, it had been decided like so:

> 3. The purpose of this sub-section is to ensure that no candidate, senator or member of the House of Representatives owes allegiance or obedience to a foreign power.

[68] Section 44(i) of the Australian Constitution provides as follows:

> Any person who: (i) is under any acknowledgement of allegiance, obedience or adherence to a foreign power, or is a subject or a citizen or entitled to the rights or privileges of a subject or a citizen of a foreign power; ... shall be incapable of being chosen or of sitting as a senator or a member of the House of Representatives.

[69] The above observation by Justice Brennan in the *Sykes* case (*supra*) was recently, in fact as recently as 27 October 2017 referred to by the High Court of Australia in the much awaited dual citizenship case of *Re Canavan and Ors* [2017] HCA 45 ("*Re Canavan and Ors* case"). The *Re Canavan and Ors* case (*supra*) panel did in fact observe that Deane J had stated in the *Sykes* case *(supra)* that:

> "the whole purpose of s. 44(i) is to prevent persons with foreign loyalties or obligations from being members of the Australian Parliament." (per Susan Mary Kiefel CJ speaking on behalf of herself and of the entire concurring High Court bench.)

[70] One of the individuals involved in the *Re Canavan* case *(supra)* was Mr Barnaby Joyce MP who was then the Deputy Prime Minister of Australia. It had turned out that he was a dual citizen of New Zealand and Australia, a fact which Mr Joyce said he was unaware of before inquiries regarding the same came to his attention. On a proper interpretation of s. 44(i) of the Australian Constitution, the Australian apex court ruled as follows:

> Section 44(i) operates to render "incapable of being chosen or of sitting" persons who have the status of subject or citizen of a foreign power. Whether a person has the status of foreign subject or citizen is determined by the law of foreign power in question. Proof of a candidate's knowledge of his or her foreign citizenship status (or of facts that might put a candidate on inquiry as to the possibility that he or she is a foreign citizen) is not necessary to bring about the disqualifying operation of s. 44(i).

[71] On account of such interpretation by the apex court, Mr Joyce and four other Senators were found to be ineligible to sit in the Australian Parliament.

[72] The learned counsel for the first defendant had submitted to us, *via* written submission after this case had been adjourned for decision, that the *Re Canavan and Ors* case (*supra*) decision could be interpreted in their favour

A in that the Sarawak Constitution *via* art. 17(1)(g) disqualifies a person who, among others, has voluntarily acquired a citizenship of a foreign country. By voluntarily acquiring a foreign citizenship, one's allegiance towards Malaysia would surely become suspect, to say the least. Such a person should not become eligible to stand for election into the Sarawak State Assembly,
B as submitted by the defendants. Learned counsel for the first defendant went on to submit, as follows:

> 8. In our present case, whilst arts. 17(1) and 18(2) of the Sarawak Constitution is not in *pari materia* with section 44(i) of the Constitution of Australia, however we submit that any issue of pre-election or post-
C election disqualification ought to be viewed as per the case of *Re Canavan and Ors* [2017] HCA 45.

[73] He concluded by submitting, at para. 9 as follows:

> The fact of the disqualification is the sole material consideration going by the express provisions of the Constitution of Sarawak. What is material
D is that the Respondent Ting Tiong Choon voluntarily undertook allegiance to a foreign country and the Sarawak Constitution by its express provisions does not provide that a person who relinquishes the said foreign citizenship may thereby re-qualify to sit in the Dewan Undangan Negeri Sarawak.

E **[74]** While I have no difficulty in appreciating the similarity in terms of what both Australia and Sarawak have as their professed intention of declaring that only persons with no divided allegiance would be eligible to stand for elections, the similarity, however, ends there.

[75] It appears to me that arts. 16, 17, 18 and 19 of the Sarawak
F Constitution read together, have created two separate and distinct regimes, in dealing with the issue of disqualification. Articles 16 and 17 deal with disqualifications of a person prior to election or pre-election. Articles 18 and 19 deal with disqualification of an elected member post-election. While I agree with learned counsel for the defendants that those articles do not
G employ the words such as 'prior' or 'pre-election' or 'post-election', I see nothing wrong in using those words to describe the plausible effects of those articles read together, in that manner. As it has become quite clear, at least to me, each of the two regimes may involve a different 'decision-maker' to determine the alleged disqualification.

H **[76]** It was not shown to us that in the cited Australian case of *Re Canavan and Ors (supra)* indeed a similar regime like what exists under the Sarawak Constitution and was considered in that case. I therefore am, with respect, of the view that the *Re Canavan and Ors* case *(supra)* could not assist the first defendant's case in that regard, moving forward.

I **[77]** As it had come to pass, the plaintiff, not being a qualified person was however elected into the Dewan. Viewed in another way, the acquisition of the citizenship of Australia did not happen after the plaintiff was elected as a member of the Dewan. In other words, he could not be caught by the

phrase 'has ceased to be qualified' for election as such under art. 19. This phrase, it was submitted by Mr Chong, presupposes a situation whereby the member under scrutiny has been perfectly qualified under art. 16 when he is elected into the Dewan, but has, since his election as a member of the Dewan, lost his qualification, thus the use of the phrase, 'has ceased to be qualified for election as such' under art. 19(1). Article 18(2)(a) is worded specifically like so: "ceases to be qualified for being elected as such".

[78] According to learned counsel for the plaintiff, the choice of the language employed namely "has ceased" and "ceases" in those two articles in the Sarawak Constitution must be construed to convey the meaning that the disqualification must be one that is incurred by the member after he was elected into the Dewan. A disqualification must be preceded by a qualification. A person must be qualified first before he can be subsequently disqualified. If one is already disqualified, what is there left to be disqualified? For that reason, I gather the Federal Constitution under art. 50(2) is so worded so as to cater to this kind of a situation. Perak has a similar provision, but Sarawak has none.

[79] The learned counsel for the plaintiff had cited to us not a few cases in support of his proposition. Among those cases has been the case of *Election Commission, India v. Saka Venkata* 1953 SCR 1144 ("the *Saka Venkata* case"). There has been no decision from our bench the interpretation of arts. 16, 17, 18 and 19 of the Sarawak Constitution. Apart from the decision of the learned High Court Judge in the High Court from where the present appeals have as their genesis, the other reported case that did touch on similar provisions in the Federal Constitution has been the *Fan Yew Teng*'s case *(supra)* where Azmi J (as he then was) expressed a view that had since not attracted any adverse comment.

[80] Because of the dearth of direct authority available emanating from our own courts, I find it necessary to reproduce quite *in extenso* the Indian Supreme Court case report in the *Saka Venkata*'s case *(supra)* here, as per the speech by learned Chief Justice Patanjali Sastri, like so:

> In the view we have expressed above as to the applicability of article 226 to the present case, it is unnecessary to enter upon a discussion of the question whether article 192(1) applies only to members who, having been already elected, have become subject to a disqualification by reason of events happening after their election; but having heard the point fully argued before us, we think it right to express our opinion thereon, especially as both sides have invited us to do so in view of its general importance.
>
> The relevant provisions of the Constitution on which the determination of the question turns are as follows:
>
> 190. (3) If a member of a House of the Legislature of a State:
>
> (a) becomes subject to any of the disqualifications mentioned in clause (1) of article 191; or

A (b) resigns his seat by writing under his hand addressed to the Speaker or the Chairman, as the case may be,

his seat shall thereupon become vacant,

191. (1) A person shall be disqualified for being chosen as, and for being, a member of the Legislative Assembly or Legislative Council B of a State:

(a) if he holds any office of profit under the Government of India or the Government of any State, specified in the First Schedule, other than an office declared by the Legislature of the State by law not to disqualify its holder;

C (b) if he is of unsound mind and stands so declared by a competent court;

(c) if he is an undischarged insolvent;

(d) if he is not a citizen of India, or has voluntarily acquired the citizenship of a foreign State, or is under any acknowledgment D of allegiance or adherence to a foreign State;

(e) if he is so disqualified by or under any law made by Parliament.

192. (1) If any question arises as to whether a member of a House of the Legislature of a State has become subject to any of the E disqualifications mentioned in clause (1) of article 191, the question shall be referred for the decision of the Governor and his decision shall be final.

(2) Before giving any decision on any such question, the Governor shall obtain the opinion of the Election Commission and shall act according to such opinion. F

193. If a person sits or votes as a member of the Legislative Assembly or the Legislative Council of a State ... when he knows that he is not qualified or that he is disqualified for membership thereof, or that he is prohibited from so doing by the provisions of any law made by Parliament or the Legislature of the State, he G shall be liable in respect of each day on which he so sits or votes to a penalty of five hundred rupees to be recovered as a debt due to the State.

As has been stated already, the respondent's conviction and sentence in 1942 disqualified him both for being chosen as, and for being, a member H of the Legislative Assembly under article 19(1)(e) read with section 7 of the Representation of the People Act, 1951, passed by Parliament, the period of five years since his release on 15 August, 1947, not having elapsed before the date of the election. The respondent having thus been under a disqualification since before his nomination on 15 March 1952, could he be said to have "become" subject to that disqualification within I the meaning of article 192? The rival contentions of the parties centred around the true interpretation to be placed on that word in the context of the provisions quoted above.

The Attorney-General argued that the whole fasciculus of the provisions dealing with "disqualifications of members", *viz.*, articles 190 to 193, should be read together, and as articles 191 and 193 clearly cover both pre-existing and supervening disqualifications, articles 190 and 192 should also be similarly understood as relating to both kinds of disqualification. According to him all these provisions together constitute an integral scheme whereby disqualifications are laid down and machinery for determining questions arising in regard to them is also provided. The use of the word "become" in articles 190(3) and 192(1) is not inapt, the context, to include within its scope pre-existing disqualifications also, as becoming subject to a disqualification is predicated of "a member of a House of Legislature", and a person who, being already disqualified, gets elected, can, not inappropriately, be said to "become" subject to the disqualification as a member as soon as he is elected. The argument is more ingenious than sound. Article 191, which lays down the same set of disqualifications for election as well as for continuing as a member, and article 193 which prescribes the penalty for sitting and voting when disqualified, are naturally phrased in terms wide enough to cover both pre-existing and supervening disqualifications; but it does not necessarily follow that articles 190(3) and 192(1) must also be taken to cover both. Their meaning must depend on the language used which, we think, is reasonably plain. In our opinion these two articles go together and provide a remedy when a member incurs a disqualification after he is elected as a member. Not only do the words "becomes subject" in article 190(3) and "has become subject" in article 192(1) indicate a change in the position of the member after he was elected, but the provision that his seat is to become thereupon vacant, that is to say, the seat which the member was filling theretofore becomes vacant on his becoming disqualified, further reinforces the view that the article contemplates only a sitting member incurring the disability while so sitting. The suggestion that the language used in article 190(3) can equally be applied to a pre existing disqualification as a member can be supposed to vacate his seat the moment he is elected is a strained and farfetched construction and cannot be accepted. The Attorney-General admitted that if the word "is" were substituted for "becomes" or "has become", it would more appropriately convey the meaning contended for by him, but he was unable to say why it was not used.

It was said that on the view that articles 190(3) and 192(1) deal with disqualifications incurred after election as a member, there would be no way of un-seating a member who became subject to a disqualification after his nomination and before his election, for, such a disqualification is no ground for challenging the election by an election petition under article 329 of the Constitution read with section 100 of the Representation of the People Act, 1951. If this is an anomaly, it arises out of a lacuna in the latter enactment which could easily have provided for such a contingency, and it cannot be pressed as an argument against the respondent's construction of the constitutional provisions. On the other hand, the Attorney-General's contention might, if accepted, lead to conflicting

A decisions by the Governor dealing with a reference under article 192 and by the Election Tribunal inquiring into an election petition under section 100 of the Parliamentary statute referred to above.

For the reasons indicated we agree with the learned Judge below in holding that articles 190(3) and 192(1) are applicable only to
B disqualifications to which a member becomes subject after he is elected as such, and that neither the Governor nor the Commission has jurisdiction to enquire into the respondent's disqualification which arose long before his election.

[81] Indeed, it would appear that the end result of the *Saka Venkata* case
C *(supra)* has been the peculiar and rather curious situation where Saka Venkata, who was a convict, and unpardoned as he was, when he was elected, could remain as an elected member of the honourable Legislative Council in Madras, in India. Likewise here, it was contended by the defendants that the effect of the *Saka Venkata*'s ruling, if followed, would result in the Dewan
D having a person whom the Sarawak State Constitution would disqualify, as he had voluntarily acquired a foreign citizenship, namely being an Australian citizen.

[82] On the other hand, granted that the Sarawak State Constitution, just like other similar constitutions, intends to disqualify a person who had
E voluntarily acquired a foreign citizenship from standing in a State election, however it must not be forgotten that the same Sarawak State Constitution *via* arts. 16, 17, 18 and 19 also show an intent to create a two-regime situation pertaining to where or at which stage, the issue of disqualification of a person and of an elected member is to be determined. This intention also must be
F given its due consideration. The Indian apex court Justices in the *Saka Venkata* case (*supra*) gave effect to what was truly intended for as contained in arts. 190(3) and 192(1) of the Indian Constitution.

My Decision

[83] Having considered the submissions of all learned counsel, I am of the
G view that the Sarawak Dewan had no jurisdiction to entertain the MM on the 12 May 2017. My reasons are summed up are as follows: (1) The language employed in arts. 18(2)(a) and 19(1) of the Sarawak State Constitution refers to disqualification of a member. The choices of the words used "has ceased" and "ceases" connote a situation where the member was properly qualified
H for election but has since lost that qualified status when, as a member of the Dewan, he committed an act of disqualification under art. 18(2)(a). This scenario did not happen in this case before us. The admitted factual matrix surrounding the plaintiff did not fit into the framework as envisaged by arts. 19(1) and 18(2)(a) of the Sarawak Constitution, as his disqualification
I was incurred way back in 2010. He had incurred that disqualification as a person under art. 17(1)(g), not as a member of the Dewan under art. 18(2)(a) of the Sarawak State Constitution.

[84] Secondly, with respect, I cannot agree that the Australian High Court decision in the *Re Canavan and Ors* case *(supra)* is of assistance to the defendants because it would appear that as long as it is established that a sitting member of the Australian Parliament is a person caught by the words of s. 44(i) of the Australian Constitution, his qualification falls and he stands disqualified. There was no issue of when that disqualification was incurred by the sitting member. In fact, some of the affected Australian MPs were not aware of their disqualifying factor, *to wit*, their dual citizenship status until very recently, but well before they were elected into Parliament. As such, the mere fact that, for instance, Mr Canavan and the other affected MPs and Senators had dual nationality status was fatal to their cause. It would appear that the moment dual citizenship is established, s. 44(i) kicks in to bite and never let go. It would appear that although Australia recognises dual nationality, however, for the purpose of election to her Parliament, they are incapable of standing for election into the Australian Parliament. But under the Sarawak Constitution, there is a demarcating line which differentiates between disqualification incurred before election by a person and a disqualification incurred by a member after his election into the Dewan by a sitting and elected member of the Dewan. As all parties had agreed that the Dewan had jurisdiction to determine an art. 19(1) question raised as to the status of a sitting member, the only question that is left is whether the Dewan's jurisdiction in that regard could extend to determine an alleged disqualification that was incurred long before that member was elected into the Dewan. It is my view that the Dewan is not empowered to do that.

[85] Thirdly, I agree with the decision in the *Saka Venkata* case *(supra)* which is a very persuasive authority coming from the Supreme Court of India interpreting constitutional provisions in the Indian Constitution which are nearly similar with the Sarawak Constitutional provisions under consideration before us. That *Saka Venkata* case *(supra)* decided that for the Governor to exercise jurisdiction over the issue of Saka Venkata's status as a member of the Legislative Council of Madras, it must be established first that the alleged disqualification must have incurred after he was elected into the august Assembly, not before. The use of the words 'has become' and 'becomes' instead of 'is' in the relevant articles under scrutiny must be interpreted to convey such a meaning to those articles, in that the disqualification has got to be a supervening event which is incurred after he was elected as a member, as opposed to a disqualification which he had incurred long before he was elected. I am of the respectful view that the use of the words 'has ceased' and 'ceased' in arts. 19(1) and 18(2)(a) of the Sarawak State Constitution, must mean that the disqualification of the member in question must have been incurred by him after he was elected as a member into the august Dewan, not before.

[86] Fourthly, the presence in the Perak Constitution provisions in art. XXXIV and art. 50(2) of the Federal Constitution, which would deal with the situation in this case quite summarily, despite the Legislative

A Chamber having power to determine the status of a member when a question on his qualification arises. To my mind, the presence of such provision as art. 50(2) of the Federal Constitution is a clear manifestation that the Dewan Rakyat has no jurisdiction to deal with a person who has been elected into the august Dewan Rakyat when he is in fact a disqualified person before he
B was elected. The Sarawak Constitution does not have such similar provision, definitely not in art. 18 nor 19.

[87] So now, I must revert back to the MM dated 12 May 2017 and apply to it my findings as to the implications of arts. 16, 17, 18 and 19 of the Sarawak Constitution. This MM was marked as "DA1" It was issued by the
C second defendant in his capacity as a Minister, under standing order 23(1). I noted that this MM had referred to art. 17(1)(g) as a basis to disqualify the plaintiff. It went on to list down the impugned acts of the plaintiff and after averring that the plaintiff was a person "completely unqualified, unfit and untrustworthy individual to be nominated and elected to represent the people
D of Sarawak", the MM went on to state "AND WHEREAS as a result of his voluntary acts, Member for Pujut has ceased to be member of Dewan Undangan Negeri Sarawak due to the breaches of art. 17(1)(g) of the Constitution."

[88] Then came the move to table the MM for resolution of the Dewan.
E It reads like so: "Member for Pujut is disqualified under art. 17(1)(g) of the State Sarawak Constitution to be a member and has ceased to be a member of the Dewan Undangan Negeri Sarawak forthwith."

[89] From a perusal of this MM dated 12 May 2012, it is clear that the disqualifying act happened on 21 January 2010. It was also noted that the
F acts of the plaintiff disqualified him from being nominated for election. These therefore referred to pre-election disqualifying acts.

[90] But the MM had gone on to aver that the plaintiff had ceased to be a member of the Dewan. I found that to be a matter within the province of
G art. 18(2)(a) of the Sarawak Constitution which is a post-election disqualification, meaning the plaintiff must have incurred the disqualification after he was elected into the Dewan. But in truth, as revealed by the undisputed facts, the plaintiff was a member who was elected into the Dewan with a pre-election disqualification.

H **[91]** From a consideration of the MM dated 12 May 2017 it would appear that it had moved the Dewan to declare that the plaintiff had ceased to be a member of the Dewan because he had committed a disqualifying act under art. 17(1)(g) by having voluntarily acquired a foreign citizenship of Australia, way back in 2010. Clearly, the disqualifying act was committed long before
I the plaintiff's election as a member of the Dewan. The similarity with the *Saka Venkata* case's *(supra)* factual matrix in that regard cannot be more striking, where it can be readily recalled that Saka Venkata incurred his disqualification long before was elected into the Madras Legislative Council.

The learned justices in the Indian Supreme Court had this to say when interpreting arts. 190(3) and 192(1) of the Indian Constitution, which though are not exactly in *pari materia* with arts. 19(1) and 18(2)(a) of the Sarawak Constitution, are nevertheless quite similar, like so:

> Not only do the words "becomes subject" in article 190(3) and "has become subject" in article 192(1) indicate a change in the position of the member after he was elected, but the provision that his seat is to become thereupon vacant, that is to say, the seat which the member was filling theretofore becomes vacant on his becoming disqualified, further reinforces the view that the *article contemplates only a sitting member incurring the disability while so sitting. The suggestion that the language used in article 190(3) can equally be applied to a pre-existing disqualification as a member can be supposed to vacate his seat the moment he is elected is a strained and farfetched construction and cannot be accepted. The Attorney-General admitted that if the word "is" were substituted for "becomes" or "has become", it would more appropriately convey the meaning contended for by him, but he was unable to say why it was not used*." (emphasis added.)

[92] The operative words used in art. 19(1) and art. 18(2)(a) of the Sarawak Constitution are 'has ceased' and 'ceases' respectively. A plain construction of those words as they are employed in those two mentioned articles must mean that the disqualification must have been incurred by a sitting member, post-election. Those words connote a situation when a member was qualified when he was elected into the Dewan but has since, ceased to be so qualified, as he incurred a disqualification since he was elected. Article 19(1) seeks to clothe the Dewan with the power to determine whether a member has ceased to be qualified to remain as a member in the Dewan. It does not refer to a person. Article 18(2)(a) again declares that a member ceases to be qualified for election as such a member of the Dewan, when he commits any of the disqualifying acts and that includes voluntarily acquiring foreign citizenship during his time as a sitting member of the Dewan.

[93] Therefore, the Dewan only has the jurisdiction to determine the status of a member whose alleged disqualification is incurred during the duration of his membership of the Dewan, meaning after his election into the Dewan. It is only right that the Dewan only assumes jurisdiction over its members' qualification to remain as members of the Dewan. That means disqualification must be incurred after a member had been elected as a member of the Dewan. To borrow from Chief Justice P Sastri in the *Saka Venkata* case *(supra)* it 'indicate[s] a change in the position of the member after he was elected. To go backwards in time and then consider an incidence of disqualification prior to the election would amount to a determination of the disqualification of a person, as opposed to that of a member. With respect, in fact, to go back in time and deal with a disqualification that was incurred long before a person got elected as a member would amount to an overreach by the Dewan which, in my view can find no constitutional support or justification within the context of the Sarawak State Constitution.

[94] In our country, only the Federal Constitution is supreme. All other public institutions including State Legislative Assemblies must act within the confines set out in their respective constitutions. Even the Parliament is not above the law. This had been made clear by our apex court in the landmark case of *Ah Thian v. Government of Malaysia* [1976] 1 LNS 3; [1976] 2 MLJ 112 where the learned erstwhile Lord President Suffian had this to say:

> The doctrine of supremacy of Parliament does not apply in Malaysia. Here we have a written Constitution. The power of Parliament and the State legislature is limited by the Constitution and they cannot make any law as they please.

[95] In other words, their powers are circumscribed and not unlimited. In yet another case of the highest authority, namely *Pengarah Tanah dan Galian, Wilayah Persekutuan v. Sri Lempah Enterprise Sdn Bhd* [1978] 1 LNS 143; [1979] 1 MLJ 135, Justice Raja Azlan Shah acting CJ (Malaya) had occasion to state that every legal power must have legal limits, otherwise there is dictatorship. In the context of the present appeals before this court, art. 19 of the Sarawak State Constitution gives power to the Dewan to determine matters pertaining to a member's qualification which may be invoked at anytime, but the exercise of such power or jurisdiction by the Dewan is limited to the question of whether a member of the Dewan has ceased to be qualified to be so elected. That must mean that the member under scrutiny must have incurred a disqualification during the currency of his tenure as an elected member of the Dewan. It does not, with respect, warrant the Dewan to extend its jurisdiction to determining an alleged disqualification which is incurred by a member of the Dewan before his election into the Dewan. As has been made clear in the preceding paragraphs of this judgment, my reading of both arts. 18 and 19 of the Sarawak State Constitution does not yield a result consistent with an interpretation that has been advocated by all learned counsel for the defendants in these appeals before us. [See, for recent judicial reiteration of the concept, *Dewan Undangan Negeri Selangor & Ors v. Mohd Hafarizam Harun* [2016] 7 CLJ 143; *Semenyih Jaya Sdn Bhd v. Pentadbir Tanah Daerah Hulu Langat & Another Case* [2017] 5 CLJ 526; *Pembinaan Batu Jaya Sdn Bhd v. Pengarah Tanah dan Galian, Selangor & Anor* [2016] 5 CLJ 250; [2016] 2 MLJ 495].

[96] Learned counsel for the plaintiff, Mr Chong submitted that the effect of the interplay of arts. 16, 17, 18 and 19 in the Sarawak Constitution and art. 118 of the Federal Constitution, could be as follows:

> It follows therefore that if an elected candidate was under disqualification when he was elected, but no one challenges his election by election Petition, he would continue as a Member irrespective of the fact that he was under a disqualification when elected.

[97] Incongruous it may sound and appear, but I do not think that he was entirely wrong in concluding the way he did, in light of the existing legal landscape surrounding the issue at hand. Unless of course there is a similar express provision like the one that exists in the art. XXXIV of the Perak State Constitution, I am not sufficiently convinced that the Sarawak Dewan had the necessary jurisdiction to examine the disqualification of the plaintiff that was clearly incurred by in 2010, well before his election into the Sarawak Dewan in 2016 for the State seat of N74 Pujut. The extent of jurisdiction of the Dewan, upon due construction of arts. 18(2)(a) and 19(1) of the Sarawak State Constitution is limited to examining the alleged acts of disqualification committed by a sitting member during the currency of his tenure, as an elected member, namely post-election. I noted that the Perak State Constitution has similar provisions, not unlike those contained under art. 16 of the Sarawak State Constitution on the qualifications of a person desirous of standing for a State constituency in a State election. Despite this, yet Perak State Constitution has a provision like the one residing under art. XXXIV(2) within its four walls. It is my respectful view that the need for the Perak State Constitution to have such an explicit provision is because without such art. XXXIV(2) being inserted, the curious position of a disqualified person finding himself sitting in the august House, not unlike *Saka Venkata* sitting in the Legislative Council of Madras, would remain unresolved. It is my considered view that art. 19 of the Sarawak State Constitution, in its present form and substance, is not wide enough in its intended legislative ambit, to successfully anchor a contention in support of an argument that would clothe the Sarawak Dewan with the necessary jurisdiction to inquire into a disqualification incurred by a sitting member prior to his election into the Dewan. Such a crucial enabling jurisdiction, if indeed it was intended for the Dewan to possess, ought to have been provided for expressly and explicitly. It ought not to be left to be inferred from the reading, however creative, of the existing provisions as contained in art. 19 and related articles, of the Sarawak State Constitution. Indeed, such a valiant attempt by the Indian Attorney General in the *Saka Venkata's* case *(supra)* had been described and decried by the Supreme Court Justices as one that was 'more ingenious than sound' and 'a strained and far-fetched construction and cannot be accepted.'

[98] True, as the learned SAG had submitted that there would be a lacuna if the Dewan were not empowered to determine the status of the plaintiff who was a disqualified person to remain as a member in the Dewan, but to use the words of Chief Justice P Sastri in the *Saka Venkata's* case (*supra*), such submission "cannot be pressed as an argument against the respondent's construction of the constitutional provisions." An explicit provision like art. 50(2) of the Federal Constitution and/or art. XXXIV of the Perak State Constitution would certainly make plain as to how a person circumstanced as the plaintiff here could be dealt with.

A **[99]** In sum, I agree with the defendants that the plaintiff had committed a disqualifying act as a person, under art. 17(1)(g) of the Sarawak Constitution. I agree too, that such an act incurred under the said provisions as contained in art. 17(1)(a) is one that cannot be forgiven, not even under art. 17(3) of the said Sarawak State Constitution. But that is the extent that
B I can agree with the defendants. My considered view, with respect, is that the august Dewan does not have the necessary jurisdiction to determine the impugned status of the plaintiff, despite his disqualified status, because that disqualification was incurred before he was elected as a member of the Dewan. The language employed in arts. 18 and 19 of the Sarawak State
C Constitution, does not confer on the Dewan the necessary jurisdiction to determine and rule on the status of the plaintiff's disqualification. My reading of the said arts. 18 and 19 is that the Dewan is only empowered to determine and rule on the status of a member of the Dewan, who has since ceased to be qualified to be so elected. It connotes a change in the position of the
D member as to his qualified status. A disqualification based on an act of having voluntarily acquiring a citizenship of a foreign country outside of the Federation of Malaysia can still bite a member, but read with art. 18(2)(a), it must need be incurred after he has been elected as a member of the Dewan. In such a situation, the Dewan would be well within its jurisdiction to determine and take a decision on the matter. Such decision so taken by the
E Dewan shall be final and deserving of the immunity promised under art. 72 of the Federal Constitution. But the factual scenario pertaining to the plaintiff before us did not fit into the one that is envisaged by arts. 18 and 19. His disqualification was incurred well before he was elected as a member of the Dewan. To say that the Dewan had the necessary jurisdiction, as did the
F defendants, would be a contention that was, though seemingly ingenious, was nevertheless at the same time, one that is unsound, strained, far-fetched and cannot be accepted. Put simply, I find such contention to be untenable.

Effect Of My Ruling

G **[100]** Having so decided, what would be the effect of my ruling? It would therefore mean that the proceedings in the Dewan on the MM were done without the necessary jurisdiction, as it is clear to us, is of no effect. It is of null and void. As to the effect of a nullity, in the case of *Eu Finance Berhad v. Lim Yoke Foo* [1982] 1 LNS 21; [1982] 2 MLJ 37 ("*Eu Finance Berhad* case") the Federal Court through the speech by Abdoolcader J had occasion
H to say, among others:

> Where a decision is null by reason of want of jurisdiction, it cannot be cured in any appellate proceedings; failure to take advantage of this somewhat futile remedy does not affect the nullity inherent in the challenged decision. The party affected by the decision may appeal but he
I is not bound to (do so), because he is at liberty to treat the act as void. [*Birmingham (Churhwardens and Overseers) v. Shaw* [1849] 10 QB 868 880; 116 ER 329 at page 880 (per Denman C.J.)]

[101] The other Federal Court decision in *Pow Hing & Anor v. Registrar of Titles Malacca* [1980] 1 LNS 120; [1981] 1 MLJ 155 was also referred to with approval in the *Eu Finance Berhad* case (*supra*). A

[102] As a necessary corollary thereto, I am of the view that the matter of privilege or immunity under art. 72 Federal Constitution does not arise. Despite its language, cases had been brought to court challenging the decisions made in the various legislative chambers in our country. There is no dearth of such cases adorning our law reports and journals with pronouncements pertaining to this important legal principle. The latest decision being the *Teng Chang Khim v. Badrul Hisham Abdullah & Anor* [2017] 9 CLJ 630 where the Selangor's Speaker's decision in declaring the State seat of N64 Pelabuhan Klang as vacant, was challenged in court. After delving into the state of the law on justiciability, our apex court has this to say: B C

> In conclusion, we are of the view that in the present case, the Speaker was acting within the limits of the power given to him under art. 69 of the Selangor Constitution when he declared the N64 Pelabuhan Klang Constituency seat vacant. Even though the declaration was made outside the SLA proceedings, it was inevitably connected with the essential business of the SLA, made within the parameters set out by art. 69 of the Selangor Constitution, and was made to regulate the internal affairs of the SLA. Consequently, we rule that the Speaker's act is non-justiciable and the Speaker is entitled to the protection of parliamentary privilege enjoyed by the SLA as provided for under art. 72(1) of the Federal Constitution. D E

[103] With respect therefore, the point to stress here is the inescapable truth that the impugned party must act within the confines of the power which the law had conferred on it. In the context of our immediate appeals, only if the august Dewan had acted within its power as conferred on it by the Sarawak State Constitution will the cloak of immunity under art. 72 of the Federal Constitution be applicable to the Dewan's acts. However, it is my considered view that on 12 May 2017 the Dewan had not acted within the power that was conferred by the Sarawak State Constitution under art. 19, and as such, there were no valid proceedings of the Dewan, that had pertained to the MM dated 12 May 2017, that would need to be immunised, in the circumstances of these appeals. It is only when the Dewan is acting within the confines of its conferred power that its proceedings and its decision shall be deserving of being immunised by art. 72 of the Federal Constitution. It would indeed be an affront to the very essence of the rule of law, if the Federal Constitution were to protect and immunise proceedings pertaining to a matter, in the Dewan which was null and void, for want of jurisdiction. F G H

[104] Also, premised on the above, I am of the view that I do not find it necessary to consider the issue on denial of natural justice as a vitiating factor. Both issues have been rendered academic by reason of the said nullity I

of the proceedings pertaining to the ministerial motion on 12 May 2017 which I found to have been conducted by the Dewan, without proper constitutional basis.

Conclusion

[105] In the upshot, I therefore dismiss all the three appeals with no order as to costs, as these appeals involved considerable public interest as they had pertained to the true construction to be given to some significant provisions contained in the Sarawak State Constitution. I affirm the decision of the learned High Court Judge, although I am not on all fours with him on all the issues. But on the paramount issue of whether the Dewan had the jurisdiction to determine the MM dated 12 May 2017, I am in agreement with him in that the answer to that question must be in the negative.

[106] As to deposits, if any paid, are ordered to be refunded to the respective defendants accordingly.

Harmindar Singh Dhaliwal JCA (concurring):

[107] These three appeals emanate from the decision of Douglas Cristo Primus Sikayun J delivered on 17 June 2017 at the Kuching High Court. The appeals were heard together after which judgment was reserved.

[108] I have had the advantage of reading the judgments in draft of my brother Abang Iskandar Abang Hashim JCA and my sister Mary Lim Thiam Suan JCA. The background facts and the issues raised in the appeals have been meticulously set out in both the judgments. It is therefore unnecessary to restate the same.

[109] It may, however, be appropriate to recapitulate that the action by the respondent Ting Tiong Choon ("the respondent") had its genesis in the ministerial motion dated 12 May 2017 to disqualify the respondent as a member of the Legislative Assembly of State of Sarawak (referred to interchangeably as the "Dewan"). The motion was carried in the Dewan and the respondent was disqualified under art. 17(1)(g) of the Sarawak Constitution and ceased to be a member of the Dewan with immediate effect. The main ground relied upon in the said motion was that the respondent had acquired Australian citizenship in 2010 before his nomination as a candidate for election on 25 April 2016 although he had renounced the said citizenship in 2015 and remained a Malaysian citizen.

[110] The High Court had considered these matters in an extensive judgment and held that the Dewan had no power to disqualify a sitting member of the Dewan under art. 17(1)(g) of the Sarawak Constitution in respect of the alleged disqualification incurred by him before he was elected as a member of the Dewan.

[111] For the reasons stated by my learned brother Abang Iskandar JCA, I agree that the appeals must be dismissed. In view of the public interest involved in this litigation, it is perhaps appropriate to also make some observations.

[112] The provisions relevant to these appeals are arts. 16, 17, 18(2) and 19(1) of the Sarawak Constitution. Article 16 sets out the general qualifications of a citizen entitled to be elected as a member of the Dewan. Article 17 sets out the various circumstances under which a person may be disqualified from being elected as a member of the Dewan.

[113] Article 18(2) governs the situation of when a member of the Dewan shall vacate his seat in the Dewan as, for example, when he ceases to be qualified. Article 19(1) provides that the decision of the Dewan in respect of a member ceasing to be qualified shall be final. In this context, I agree that the use of the words "if an elected member ceases to be qualified for election as a member of the Dewan" in art. 18(2) and of the words "if any question arises as to whether a member of the Dewan has ceased to be qualified for election as such" in art. 19(1) clearly contemplate a situation where a sitting member incurs disqualifications during his tenure or subsequent to his election as a member of the Dewan.

[114] It is to be noted that under art. 19(1), the ceasing of a member of the Dewan to be qualified is to be decided only by the Dewan and that decision is final. It must follow that such an inquiry by the Dewan as to the question of disqualification of an elected member of the Dewan extends only to a post-election disqualification.

[115] That this must be the case is fortified by the determinative provision in the Federal Constitution ("FC") in the form of art. 118 which states:

> No election to the House of Representatives or to the Legislative Assembly of a State shall be called in question except by an election petition presented to the High Court having jurisdiction where the election was held.

This court in *Jamil Dzulkarnain v. Mohamad Kamil Shafie* [2015] 2 CLJ 1079 had held that art. 118 of the FC is "expressed in peremptory and prohibitive language.

[116] Now, reference was also made to art. 50(1) and (2) of the FC to advance the proposition that the election of a disqualified person is void in any case and the Dewan was right in its decision to take such action. Article 50(1) and (2) of the FC read:

> 50. (1) If a member of either House of Parliament becomes disqualified for membership of that House his seat shall become vacant.
>
> (2) If a person disqualified for being a member of the House of Representative is elected to that House or if a person disqualified for being a member of the Senate is elected or appointed to the Senate, or if an election or appointment to either House is contrary to art. 49, the election or appointment shall be void

[117] Even so, whilst a similar provision may appear in other State Constitutions in Malaysia, such a provision is nowhere to be found in the Sarawak Constitution. Even if it was so found, it would not support the proposition put forward by the appellants. In my view, art. 50 of the FC must apply to a post-election disqualification because of the operative words "if a member ... **becomes** disqualified" (emphasis added). Article 50(2) of the FC would then accordingly apply to make that election void. Any other interpretation would lead to a conflict with art. 118 of the FC as alluded to earlier.

[118] Now, this pre-election and post-election dichotomy are not new. It was recognised in *Fan Yew Teng v. Setia Usaha Dewan Raa'yat & Ors* [1975] 1 LNS 39; [1975] 2 MLJ 40 ("*Fan Yew Teng*") where Mohd Azmi J (as he then was) made the following observations (at p. 41):

> Before going into the merits of the conflicting arguments, it is necessary to appreciate that article 48(1) applies to both pre-election and as well as to post-election disqualification. In short, any person who comes within one of the sub-clauses (a) to (f) of this article, will not be fit to be a candidate for membership of the Dewan Ra'ayat or be an appointee of the Dewan Negara; and further, if a sitting Member of Parliament incurs any of the disqualification mentioned in the aforesaid sub-clauses, and no question arises as to this disqualification, he will be disqualified.
>
> Secondly, it is clearly obvious that articles 50(1) and 53, as opposed to article 48(1), apply only to post-election disqualification, i.e. disqualification arising after election of a person to the House of Representatives or appointment to the Senate.
>
> Thirdly, it is also essential to bear in mind that, unlike the constitution of some countries with parliamentary system of government, our Constitution does not confer on the House of Representatives the power to decide elections in disputes, but only questions relating to the disqualification of members. In the case of an election to the House of Representatives, the question of pre-election disqualification including the question of an election on the ground of disqualification of a candidate is given to the High Court under article 118, and if the disqualification is established, the election shall be void under article 50(2).

[119] This decision in *Fan Yew Teng* has stood the test of time. And I fully agree with the observations of Mohd Azmi J in the passage earlier cited. I should add that the Indian courts have also recognised this dichotomy in several cases, the notable one being the Supreme Court decision in *Election Commission India v. Saka Venkata Subba Rao* 1953 4 SCR 1144. The court there appreciated that arts. 190(3) and 190(2) of the Constitution of India, which resemble very closely our own provisions in the Federal Constitution, applied only to disqualifications to which a member of a House of the Legislature of a State becomes subject after he is elected as such.

[120] It would therefore appear that both the Federal Constitution and the Sarawak Constitution have made a distinction between the jurisdiction of the election judge after the election process as emphatically set out in art. 118 of the FC and the jurisdiction of Parliament and the State Legislative Assembly after such member is duly elected.

[121] It is also plain that the Dewan in this case had the authority to decide only on post-election disqualification on matters which arose after a member had already been elected to the Dewan. That this must be so may be due primarily to the fact that the Dewan may be ill-equipped to deal with pre-election disqualification issues as such matters are better dealt with by the election judge as provided under art. 118 of the FC read with s. 32(e) of the Election Offences Act 1954.

[122] As noted by the learned High Court Judge, matters relating to citizenship involve serious legal and constitutional issues. In the present case, the defeated candidate, Datuk Hii King Chong, had taken this very issue presented in these appeals to the election court. The election judge, however, upheld a preliminary objection by the respondent here and struck out the election petition. The proceedings here, as rightly noted by the learned judge, and leaving aside the question of jurisdiction, seem very much like the proverbial second bite of the cherry.

[123] Finally, the appellants also raised what appeared at first sight to be compelling arguments on the issue of justiciability. It was forcefully contended that the ministerial motion on 12 May 2017 in the Dewan in respect of the disqualification of the respondent was a matter within the jurisdiction of the Dewan and was therefore non-justiciable as provided by art. 72(1) of the Federal Constitution which reads:

> The validity of any proceedings in the Legislative Assembly of any State shall not be questioned in any court.

[124] This issue of justiciability, which the appellants contend was central to these appeals, was dealt with by the Federal Court in the recent case of *Teng Chang Khim v. Badrul Hisham Abdullah & Anor* [2017] 9 CLJ 630 ("*Teng Chang Khim*"). The case of *Teng Chang Khim* concerned the decision of the Speaker of the Dewan Undangan Negeri of Selangor in declaring vacant a seat because of a State Assemblyman's absence from the Dewan for six months without the Speaker's leave.

[125] After a thorough analysis of the privileges and powers of Parliament and State Legislative Assemblies, the Federal Court held at para. 23:

> Thus, there can be no doubt that the business of Parliament and State Legislative Assemblies are immune from judicial interference. The courts have no power to interfere with the internal management of Parliament or any State Legislative Assembly. This immunity arises from the doctrine of separation of powers between the three principal organs of Government, namely, the executive, the legislature and the judiciary.

[126] In concluding, the Federal Court held at para. 51:

> In conclusion, we are of the view that in the present case, the Speaker was acting within the limits of the power given to him under art. 69 of the Selangor Constitution when he declared the N46 Pelabuhan Klang Constituency seat vacant. Even though the declaration was made outside the SLA proceedings, it was inevitably connected with the essential business of the SLA, made within the parameters set out by art. 69 of the Selangor Constitution, and was made to regulate the internal affairs of the SLA. Consequently, we rule that the Speaker's act is non-justiciable and the Speaker is entitled to the protection of parliamentary privilege enjoyed by the SLA as provided for under art. 72(1) of the Federal Constitution.

[127] Reverting to the instant appeals, the learned judge in the High Court was conscious of the importance of the issue of non-justiciability as he considered it to be central to the case of the appellants. He did not, however, have the benefit of the decision in *Teng Chang Khim* as it was only delivered after the High Court had handed down its decision on 17 June 2017.

[128] Be that as it may, the Federal Court in *Teng Chang Khim* had also considered the earlier Federal Court decisions of *YAB Dato' Dr Zambry Abd Kadir & Ors v. YB Sivakumar Varatharaju Naidu; Attorney-General Malaysia (Intervener)* [2009] 4 CLJ 253 and *Dewan Undangan Negeri Selangor & Ors v. Mohd Hafarizam Harun & Ors* [2016] 7 CLJ 143 (also considered by the learned judge in the instant case) and came to a finding that these two cases were distinguishable in that in both cases "the respective Legislative Assemblies had exceeded its jurisdictions as provided under the Constitution of each State hence there was room for judicial interference" (at para 50).

[129] It can therefore be surmised that although the business of Parliament and State Legislative Assemblies are immune from judicial interference as provided by art. 72(1) of the FC, the courts will have jurisdiction to intervene if Parliament or the State legislative Assemblies act outside of or exceed its powers as provided under the Federal or State Constitutions.

[130] There is nothing novel about this legal proposition as it stems from principles consonant with a constitutional democracy; the most important one being that no one, including the Government, is above the law. Less relevant to the present appeals, although no less important, is the principle that no public authority can have absolute or unfettered discretion in carrying out its functions.

[131] Applied to the present context, the jurisdiction and powers of Parliament and the State Assemblies are circumscribed by the Federal Constitution and the relevant State Constitutions and if any such purported exercise of its power exceeds the powers so provided, the courts will have jurisdiction to strike down such decisions.

[132] With that being the state of the relevant law in relation to the issue of justiciability as provided under the Federal Constitution, it must follow that the present appeals turn on the question of whether the Sarawak State Legislative Assembly had exceeded its jurisdiction in disqualifying the respondent. To put it simply, if it had exceeded its jurisdiction, the Assembly is not entitled to the protection of parliamentary privilege as provided by art. 72(1) of the FC and the protection of art. 19 of the Sarawak Constitution. If it has not exceeded its jurisdiction, then the court has no jurisdiction to interfere with the decisions of the Assembly. In short, the Dewan must act within the law.

[133] In the event, and for the reasons provided, the Dewan had exceeded its powers and had no authority to disqualify the respondent as it did through the ministerial motion dated 12 May 2017. As a consequence, the appeals are dismissed. The order of the High Court is affirmed. Since the appeals concern a matter of public interest, there shall be no order as to costs. Deposits to be refunded.

Mary Lim JCA (dissenting):

[134] These three appeals which were heard together arose out of the same decision made by the learned judge on 17 June 2017. After hearing extensive submissions from all counsel involved, we reserved our decision. Having perused the records of appeals and having considered the oral and written submissions of all parties, this is my decision.

[135] For ease of reference, the parties will be referred to as they were at the High Court.

Undisputed Facts

[136] The plaintiff is a Malaysian citizen born in the State of Sarawak. In 1992, he received his MBBS degree from the University of New South Wales, Australia. On 20 January 2010, he acquired Australian citizenship and as mandated by the Constitution of Australia, he registered himself as a voter. On 4 April 2016, the Government of Australia approved and accepted the plaintiff's application to renounce his Australian citizenship.

[137] On 25 April 2016, the plaintiff offered himself for nomination as a candidate for the State seat for the constituency of Pujut (N. 74). As part of the nomination process, the plaintiff affirmed a statutory declaration in Form 5A on 22 April 2016 stating that he had not lost any of his constitutional rights or by any written law pertaining to his eligibility to be a member of the Legislative Assembly of the State of Sarawak. Together with three others, the plaintiff's nomination was accepted by the returning officer. On 7 May 2016, the plaintiff polled the most votes, 8,899 votes with a majority of 1,759 votes and he was duly returned.

A **[138]** On 16 June 2016, Hii King Chong, one of the defeated candidates filed an election petition against the plaintiff seeking a declaration that the plaintiff was not duly elected or ought not to have been returned. The principal ground relied on was the matter of the plaintiff's Australian citizenship, that the plaintiff's nomination was *ultra vires* art. 17(1)(g) of the Constitution of
B the State of Sarawak.

[139] On 14 October 2016, the election judge upheld a preliminary objection raised by the plaintiff and the election petition was dismissed with costs.

[140] The second defendant is the Minister for International Trade and
C E-Commerce, Minister for Finance II and the Assemblyman for the State Constituency of Bawang Assan. On 4 May 2017, the Director of Criminal Investigations Department PDRM, Bukit Aman, informed the second defendant, that the plaintiff had renounced his Australian citizenship on 4 April 2016. However, at that juncture, the PDRM was not able to ascertain whether the plaintiff had exercised any right of citizenship of another country
D or that the plaintiff had made any declaration of allegiance to any country outside of Malaysia.

[141] On 12 May 2017, the second defendant, by way of a ministerial motion moved the State Legislative Assembly (State Assembly) to disqualify
E the plaintiff. The State Assembly voted and the ministerial motion was carried with 70 votes against ten votes. Thereupon, the first defendant, the Speaker, announced that the plaintiff was disqualified under art. 17(1)(g) of the Constitution of the State of Sarawak and that the plaintiff forthwith, ceased to be a member of the State Assembly.

F **[142]** On 19 May 2017, the Election Commission, the fifth defendant, announced that the nomination of candidates for the state constituency of Pujut (N74) By-election will be held on 20 June 2017 and that polling will be held on 4 July 2017.

The Originating Summons

G **[143]** The plaintiff filed the instant originating summons, seeking *inter alia* that the proceedings and the decision taken at the State Assembly on 12 May 2017 was null and void for being *ultra vires* the State Constitution and that the State Assembly has no power to disqualify the plaintiff under art. 17(1)(g) of the Constitution of the State of Sarawak. The plaintiff cited five
H defendants, namely the Speaker of the State Assembly, Wong Soon Koh (Minister for International Trade and E-Commerce, Minister for Finance II and the Assemblyman for Bawang Assan), Legislative Assembly of the State of Sarawak, the Government of the State of Sarawak and the Election Commission.

I **[144]** The originating summons proceeded only against the first three defendants after it was earlier struck out against the fourth defendant (Government of the State of Sarawak) with no order for costs although the fifth defendant (Election Commission) remained a party to the originating summons.

[145] This is the ministerial motion moved under standing order 23(1)(a):

YB Dato Sri Wong Soon Koh (N.53 Bawang Assan) moves:

WHEREAS Article 17(1)(g) of the State of Sarawak Constitution states that a person is disqualified from being elected as an elected member of Dewan Undangan Negeri if he has voluntarily acquired citizenship of or exercised rights of citizenship in or has made declaration of allegiance to any country outside the Federation.

AND WHEREAS by way of Statutory Declaration dated 22.4.2016, Honourable Member for Pujat declared that he has NOT lost the qualification to be elected as ADUN in breach of the Constitution.

AND WHEREAS Member for Pujat acquired the Australian citizenship on 20.1.2010.

AND WHEREAS Member for Pujat declared allegiance to Australia at the time of acquiring the citizenship.

AND WHEREAS Member for Pujat exercised his rights as a citizen by registering as a voter with the Australian Electoral Commission.

AND WHEREAS Member for Pujat was declared bankrupt twice in Australia.

AND WHEREAS Member for Pujat is completely unqualified, unfit an untrustworthy individual to be nominated and elected to represent the people of Sarawak.

AND WHEREAS as a result of his voluntary acts, Member for Pujat has ceased to be a Member of Dewan Undangan Negeri Sarawak due to the breaches of Article 17(1)(g) of the Constitution.

Therefore It Is Moved That This House Hereby Resolve That:

Member for Pujat is disqualified under Article 17(1)(g) of the State of Sarawak Constitution to be a member and has ceased to be a member of the Dewan Undangan Negeri Sarawak forthwith.

[146] As mentioned, the motion was carried and the plaintiff ceased to be a member of the State Assembly.

[147] Five agreed issues were posed for determination by the High Court:

(i) Whether the ministerial motion on 12 May 2017 in respect of the disqualification of the plaintiff were matters within the jurisdiction of the third defendant and whether the matter is justiciable.

(ii) Whether the third defendant acted within its constitutional legal powers.

(iii) Whether the third defendant had acted in accordance to the principles of natural justice.

(iv) Whether the decisions made on 12 May 2017 by the third defendant are matters and questions within the provisions of the Constitution of the State of Sarawak that is final and cannot be challenged in any court of law.

(v)(i) Whether the plaintiff breached the provisions of the art. 17(1)(g) of the Constitution of the State of Sarawak; and

(ii) What is the proper interpretation of the provisions of art. 17(1)(g) of the Constitution of the State of Sarawak; and

(iii) Whether it is to be read in isolation or with arts. 24 and 27 of the Federal Constitution.

Decision Of The High Court

[148] On 17 June 2017, the High Court answered the first issue in the positive, that the matters raised in the originating summons are justiciable and that the court has the necessary jurisdiction to enquire. The learned judge then found that the ministerial motion and the proceedings of the State Assembly on the morning of 12 May 2017 to be unconstitutional and in violation of art. 118 of the Federal Constitution and is therefore null and of no effect.

[149] The learned judge further agreed with the plaintiff and *inter alia* held that the State Assembly is not a proper forum and has no power to disqualify the plaintiff as a sitting member of the State Assembly under art. 17(1)(g) of the Constitution of the State of Sarawak (Sarawak State Constitution) in respect of an alleged disqualification which was incurred before the plaintiff was elected as a member of the State Assembly (pre-election disqualification).

[150] The High Court also held that the language in arts. 18(2) and 19(1) of the Sarawak State Constitution are applicable only to disqualifications to which a sitting member incurs subsequent to his election (post-election disqualification). The orders as sought by the plaintiff were then granted in the terms prayed together with orders of costs payable by the first and second defendants to the plaintiff.

[151] The first, second and third defendants were dissatisfied with the decision and they filed their respective appeals as follows:

(i) Civil Appeal No: Q-01(A)-212-07/2017 by the first defendant;

(ii) Civil Appeal No: Q-02(A)-1382-07/2017 by the second defendant;

(iii) Civil Appeal No: Q-01(A)-250-07/2017 by the third defendant.

Submissions Of The Respective Parties

[152] All counsel made full and extensive submissions, both written and oral. I shall summarise the submissions that have been ably canvassed by the respective counsel as follows.

Submissions Of The First Defendant (Q-01(A)-212-07/2017)

[153] The first issue before the court is the matter of justiciability of the matter. The first defendant contended that by virtue of art. 72 of the Federal Constitution, the validity of the proceedings in the State Assembly is not

open to scrutiny by the court. This issue was in fact, recognised by the learned judge who answered the poser in the affirmative but proceeded nevertheless to examine the decision of the State Assembly.

[154] The first defendant relied on the decision of the Federal Court in *Teng Chang Khim v. Badrul Hisham Abdullah & Anor* [2017] 9 CLJ 630 which held in clear categorical terms that the business of the State Assembly is immune from court scrutiny. This case concerned the decision of the Speaker of the State Assembly of Selangor who had declared the seat of N46 Pelabuhan Klang constituency vacant when the State Assemblyman concerned was absent from the State Assembly for six months without the Speaker's leave. At the time of decision in the present appeal, this decision of the Federal Court had not been handed down.

[155] On the issue of the disqualification of the plaintiff, it is the contention of the first defendant that the plaintiff breached art. 17(1)(g) of the Sarawak State Constitution in that he "has voluntarily acquired citizenship of, or exercised rights of citizenship in, any country outside the Federation or has made a declaration of allegiance to any country outside the Federation." Although the plaintiff renounced his citizenship on 4 April 2016, the renunciation is irrelevant because art. 17(1)(g) applies as soon as the plaintiff "voluntarily acquired citizenship of, or exercised rights of citizenship in, any country outside the Federation or has made a declaration of allegiance to any country outside the Federation."

[156] According to learned counsel for the first defendant, a plain reading of art. 17(1)(g) shows that the disqualification applies as soon as the plaintiff acquires foreign citizenship, regardless what one does subsequently with that foreign citizenship.

[157] In the reading of the Federal Constitution, it was erroneous of the learned judge to read into arts. 17, 19 and even 118, the words "pre election" and "post-election", which were conspicuously not in those provisions or any other provision in the Federal Constitution; more so after having said that "I am not prepared to read into art. 17(1)(g) something which is not there." The learned judge had said that art. 17(1)(g) relates only to "pre-election" disqualification, and that a "pre-election" disqualification can only be raised by way of an election petition under art. 118.

[158] Learned counsel for the first defendant contended that the reading and interpretation afforded by the learned judge does violence to the clear language of arts. 17(1)(g) and 19(1) of the Sarawak State Constitution; and surely this cannot be the intent of these provisions of the Sarawak State Constitution.

[159] Learned counsel for the first defendant also contended that the learned judge had overlooked the fact that the ministerial motion was not about the conduct of the elections which may then fall within the domain or purview

of art. 118 of the Federal Constitution; the ministerial motion was all about the disqualification of the plaintiff which is well within the ambit of art. 17(1)(g) of the Sarawak State Constitution.

[160] It was the first defendant's further submission that art. 17(1)(g) of the Sarawak State Constitution must be read together with arts. 48(1)(f) and 53(1) of the Federal Constitution in that the matter of disqualification of a member of the House of Parliament or the State Assembly, as the case may be, is a matter to be decided by and within the House or Assembly, and not by the court. In both cases, a member is disqualified where the member voluntarily acquires foreign citizenship or exercises a right of citizenship of a foreign country or declares allegiance to a country other than Malaysia. In the instant case, the plaintiff is disqualified because as a citizen of Australia, he would be mandatorily required to vote. Voting is an exercise of a right of citizenship.

[161] Finally, the first defendant submitted that he did not remove the plaintiff; the plaintiff was removed by the State Assembly on a majority vote of 70:10. Since this was a decision of the State Assembly, the Dewan Undangan Negeri (Privileges & Powers) Ordinance 2007 (Cap. 65), in particular ss. 3, 5, 7 and 10, read together with arts. 17(1)(g) and 19(1) of the Sarawak State Constitution provide that the matter of the disqualification of the plaintiff and the first defendant's involvement in that matter are protected from action and questioned in court. This issue was not addressed by the learned judge.

Submissions Of The Second Defendant (Q-02(A)-1382-07/2017)

[162] The appellant in the second appeal is the second defendant. His counsel associated himself with and adopted the submissions of learned counsel for the first defendant and added *inter alia* the following submissions.

[163] First, arts. 17(1)(g) and 19(1) of the Sarawak State Constitution expressly confer on the State Assembly the jurisdiction to decide on the disqualification of its members. There are no terms in these articles prescribing or qualifying that these articles operate or apply to "pre-election" or "post-election" disqualification. Instead of looking for "pre-election disqualification," the learned judge should only be concerned with the issue of whether the State Assembly has the power to disqualify its members. The answer to that issue is clearly in the affirmative in which case, the matter is outside the scrutiny of the court.

[164] In any case, the reading by the learned judge that it is only the election court and not the State Assembly which can decide on "pre-election disqualification" by virtue of art. 118 of the Federal Constitution leads to an "absurd situation". It is "absurd" in that "an elected member of the DUN who is subsequently found to be legally disqualified under the Constitution can never be removed if such disqualification is discovered after the expiry of the time period to file an election petition under s. 38 of the Election

Offences Act 1954 or if the disqualification is not otherwise adjudicated upon by the election court for any reason, as in the present case where the election petition was struck out on a technicality and the issue of the respondent's Australian citizenship was never decided by the election court."

[165] The second defendant also reads art. 118 of the Federal Constitution and arts. 17 and 19 of the Sarawak State Constitution as covering "different and complementary areas." Article 118 expressly applies to challenge the "result of an election" whereas arts. 17 and 19 of the Sarawak State Constitution applies to "disqualification of a member." The provisions are therefore not in conflict and there is no question of art. 118 of the Federal Constitution "overriding" art. 19 or even art. 17 of the State Constitution.

[166] Learned counsel for the second defendant further submitted that the learned judge posed wrong or irrelevant questions instead of considering whether the disqualification in art. 17(1)(g) is lifted when the plaintiff renounced his Australian citizenship. Had the learned judge posed that material question, the answer would have been readily clear in that the disqualification remains regardless any subsequent renunciation of the Australian citizenship.

[167] The learned judge also erred in accepting the plaintiff's argument that "it cannot be that a foreigner who later became a Malaysian citizen has better rights compared to a citizen by birth who acquired foreign citizenship only to renounce that citizenship later, be worse off." Learned counsel submitted that art. 17(1)(g) has nothing to do with the issue of a foreigner taking Malaysian citizenship; instead it has everything to do with disqualification. Once disqualified under art. 17(1)(g), there are no provisions for the removal of that disqualification. The position of the foreign citizen stands distinctly separate and different from that of the Malaysian citizen who has acquired foreign citizenship, exercised rights of citizenship in another country or has made a declaration of allegiance to a country other than Malaysia.

Submissions Of The Third Defendant [Q-01(A)-250-07/2017]

[168] The third defendant, represented by the State Attorney of Sarawak, is the appellant in the third appeal before us. Learned State Attorney similarly adopted the submissions of the first and second defendants, emphasised the importance of proper interpretation of the Federal Constitution and the Sarawak State Constitution and, made the following further submissions.

[169] Learned State Attorney submitted that in dealing with the issue of qualification and disqualification of the members of the State Assembly, arts. 16 to 19 must be read and construed together with a view to securing the mischief at which these provisions are directed. The mischief being that those who are not qualified or who are disqualified from standing for election to the State Assembly or being a member thereof, do not enter, and if they enter, they do not remain in the State Assembly.

[170] Learned State Attorney pointed out that art. 17 provides for disqualification of members of the State Assembly, and the cessation of such disqualification. However, a careful reading of art. 17(3) reveals that, unlike the other disqualifications listed therein, art. 17(3) does not provide for the "removal, termination or forgiveness (eg by royal pardon)" of the disqualification by reason of citizenship in the terms set out in art. 17(1)(g). Learned State Attorney added that the relevant question to ask is not whether the disqualification arises pre or post-election, but whether the challenge is to the election itself or to the continued presence of an elected member in the State Assembly. Where it is the earlier, then, rightly it should be by way of an election petition under art. 118 whereas in the case of the latter, art. 19 provides that the relevant time is "if the question arises" which is "whenever the question arises." Here, it arose when the ministerial motion was presented on 12 May 2017.

[171] Learned State Attorney fortified his argument by referring to the terms of art. 53 of the Federal Constitution. Under that article and art. 19 of the Sarawak State Constitution, when a motion is tabled on the question of whether a disqualification under art. 17(1)(g) ceases or is removed by a renunciation of the foreign citizenship, the question is one that necessarily falls within the jurisdiction of the State Assembly itself to determine. The question of the plaintiff's disqualification occasioned by his foreign citizenship and the effect of any subsequent renunciation falls precisely within that ambit. These provisions of the State Constitution and the Federal Constitution clearly mandate that a decision on a disqualification of a member is to be taken and decided entirely by the State Assembly itself. Once taken and decided, the State Assembly's decision shall be final.

[172] It was further submitted that since every member of the State Assembly is required under art. 22, to take and subscribe to an oath prescribed in Part III of the Schedule, the voluntary acquisition of citizenship of another country amounts to a disqualification. According to learned State Attorney, this is because such an act is incompatible with the terms of the oath taken, that the member "will bear true faith and allegiance to the State of Sarawak and to the Federation."

[173] As for the plaintiff's comparisons with a foreign national who acquires Malaysian citizenship, the submission is that such persons are on a completely different footing. From the specific terms of art. 17(3), a foreign national who acquires Malaysian citizenship and who pledges true allegiance to the Yang di-Pertuan Agong and to be a "true, loyal and faithful citizen of Malaysia" does not have better rights than citizens like the plaintiff. Such persons are specifically provided for under art. 17(3), unlike Malaysian citizens like the plaintiff who have acquired citizenship of another country sometime in their lifetime.

Submissions Of The Election Commission

[174] The Election Commission is a nominal party in these appeals. That, however, has not stopped learned Senior Federal Counsel from associating himself with the submissions of the appellants.

[175] It is also the submission of learned SFC that the motion before the State Assembly was the disqualification of the plaintiff and not any question about the election. Now that the plaintiff has been elected, the power to deal with the issue of his disqualification and to disqualify the plaintiff in the State Assembly lies with the State Assembly. Not even the Election Commission has any power to determine that question.

Submissions Of The Plaintiff

[176] In response, the plaintiff submitted that the decision of the State Assembly to disqualify him as an elected member of the State Assembly under art. 17(1)(g) for an alleged disqualification incurred before his election is justiciable and open to challenge in court. Article 72 of the Federal Constitution read with art. 19 of the Sarawak State Constitution allow such a construction.

[177] Learned counsel relied on the authorities of *Dewan Undangan Negeri Selangor & Ors v. Mohd Hafarizam Harun & Ors* [2016] 7 CLJ 143, *Yang Dipertua, Dewan Rakyat & Ors v. Gobind Singh Deo* [2014] 9 CLJ 577; [2014] 6 MLJ 812 and *YAB Dato' Dr Zambry Abd Kadir & Ors v. YB Sivakumar Varatharaju Naidu; Attorney-General Malaysia (Intervener)* [2009] 4 CLJ 253; [2009] 4 MLJ 253. In all these cases, the Federal Court had held that the State Assembly must always act within the scope of its constitutional and legal powers before the protection under art. 72(1) of the Federal Constitution can arise. Since the State Assembly has exceeded its jurisdiction as provided under the Sarawak State Constitution, there is always room for judicial intervention.

[178] On the question of the State Assembly's powers to disqualify its members, learned counsel submitted that it depends on the disqualification under scrutiny. The disqualifications set out in art. 17(1)(a) to (g) differ, some are prevailing while others concern pre-election disqualifications. Each has to be examined separately.

[179] The plaintiff maintained that he is qualified to be elected as a member of the State Assembly under art. 16 of the Sarawak State Constitution; and that he is not disqualified under arts. 17(1), 18(2) and 19(1) of the Sarawak State Constitution, and art. 53(1) of the Federal Constitution. From the terms of arts. 18(2) and 19(1), it is also demonstrably clear that these two articles contemplate a situation where a sitting member incurs or acquires disqualifications either subsequent to his election or during his tenure as a member of the State Assembly (post-election disqualification) and it is in this respect that the State Assembly has authority. These articles do not apply to a candidate or a person who incurs disqualifications before he was elected as a member of the State Assembly.

[180] Learned counsel for the plaintiff pointed out that both arts. 18(2) and 19(1) refer to the disqualification of a "member." Under art. 18(2), "if an elected member ceases to be qualified for election as a member of the Dewan" while under art. 19(1), it is "if any question arises as to whether a member of the Dewan has ceased to be qualified for election as such in art. 19(1). Both provisions speak of a member and a person may only be a member of the State Assembly after an election.

[181] Like art. 53(1) of the Federal Constitution, art. 19(1) confers on the State Assembly, power to decide only on the question of post-election disqualifications or supervening disqualifications acquired subsequent to the election of the member to the Legislature. The State Assembly "has no jurisdiction at all" to deal with pre-election disqualifications.

[182] On the other hand, art. 17(1) refers to the disqualification of "a person" for being elected as a member of the State Assembly. Since the plaintiff is already a member of the State Assembly, art. 17(1) does not apply.

[183] This distinct and separate difference in the terms used actually describes the different status that are under scrutiny. A person can only be a member after he has been elected and it is the State Assembly that will deal with the question of the disqualification of the member. When the State Assembly has taken a decision that an incumbent member is disqualified, that member's seat will then become vacant and the decision of the State Assembly on that disqualification is final.

[184] Learned counsel for the plaintiff submitted that this reading does not necessarily mean that a person who is disqualified by reason of events occurring before his election is immune from challenge. There are separate provisions of the law dealing with such pre-election disqualifications of a candidate. For instance, reg. 7(1) of the Elections (Conduct of Elections) Regulations 1981 and this is consistent with art. 118 of the Federal Constitution which is "a specific and absolute bar to the Dewan to entertain the issue" and which provides that any pre-election disqualification may only be challenged by way of an election petition. Article 118 is an absolute bar to the State Assembly entertaining questions of alleged pre-disqualifications because the bar is couched in negative mandatory terms.

[185] The plaintiff cites the following decisions from the Supreme Court of India in support: *Election Commission of India v. Saka Venkata Subba Rao, Union of India* 1953 SCR 1144; *Election Commission of India v. Bajrang Bahadur Singh & Others*, Special Leave Petition (Civil) No. 8850 of 2015; *Karupati Maria Das v. Dr Ambedkar Seva Samjam & Ors* [2009] 7 SCC 387; *Consumer Education & Research Society v. Union of India & Others* [2009] 8 MLJ 1420. In all these cases, the Supreme Court of India held that where the disqualification arose before the election, the proper forum to decide the matter is by way of an election petition. In such circumstances, arts. 190(3) and 192(2) of the Indian Constitution which are similar to arts. 18(2) and

19(1) of the Sarawak State Constitution, do not apply. The argument of the Attorney General that these provisions of the Indian Constitution apply to both pre and post-election disqualification was rejected by the Supreme Court.

[186] Learned counsel for the plaintiff reiterated that in any event, the plaintiff was "indeed a qualified candidate for election at the time of the election on 7 May 2017 because he renounced his Australian citizenship on 4 April 2016, and has since, then been a Malaysian citizen." The relevant date for determining the qualification or disqualification of the plaintiff is at the time of election, which is 7 May 2017. For these reasons, any action based on the disqualification of the plaintiff under s. 32(e) of the Election Offences Act 1954 will necessarily fail.

Deliberations And Decision

[187] At the outset, let me say that I do not find the related proceedings before the State Assembly to be improper or questionable even though an election petition had earlier been filed, raising a similar ground. While the matter of the plaintiff's disqualification was taken up by way of an election petition and the election court had struck out the election petition following a preliminary objection, it is nevertheless open to the State Assembly to address the issue of the plaintiff's disqualifications for reasons that will become clearer when the questions concerning justiciability and disqualification are fully considered.

[188] There are two primary issues for consideration: justiciability of the resolution and decision reached by the State Assembly, and the matter of the plaintiff's disqualification.

Justiciability

[189] These three appeals bring into sharp focus the principle of parliamentary privilege. If the principle applies in these appeals, the argument is that the plaintiff's application ought to have been dismissed for want of jurisdiction; frequently understood under the rubric of "non justiciability." The learned judge had answered in the affirmative, finding the issue to be justiciable and within the purview of the court's jurisdiction leading thus to the orders granted.

[190] The respect for and abidance of this principle of parliamentary privilege is part and parcel of the doctrine of the separation of powers, a doctrine which is integral to the "basic structure" or "basic fabric" of the Federal Constitution. This doctrine was reaffirmed in the recent landmark decisions of the Federal Court in *Semenyih Jaya Sdn Bhd v. Pentadbir Tanah Daerah Hulu Langat & Another Case* [2017] 5 CLJ 526 and *Indira Gandhi Mutho v. Pengarah Jabatan Agama Islam Perak & Ors And Other Appeals* [2018] 3 CLJ 145. These pronouncements speak volumes of the importance of this fundamental and essential doctrine.

[191] Respect for the principle of parliamentary privilege means that decisions on and related to the essential core business and internal management of Parliament and the respective State Legislative Assemblies are immune from being called in question in court. This means too, that there is finality in such decisions. This immunity which is actually guaranteed and deeply entrenched in art. 72(1) of the Federal Constitution and in the respective Constitutions of the States of the Federation, was recently reaffirmed by the Federal Court in *Teng Chang Khim v. Badrul Hisham Abdullah and Suruhanjaya Pilihanraya Malaysia* [2017] 9 CLJ 630.

[192] As pointed out earlier, at the time of the decision of the learned judge, the Federal Court's decision in *Teng Chang Khim v. Badrul Hisham Abdullah* had yet to be handed down. This court has had the benefit of this decision and it bears careful and close examination against the backdrop of several other earlier decisions of the court as well as some other case authorities. The decision of the Federal Court is not only of particular application to the facts and circumstances of the present appeals, the decision binds this court on this first issue of justiciability.

[193] In this decision, the Speaker of the State Legislative Assembly of Selangor had, pursuant to art. 69 of the Selangor State Constitution declared the seat of N46 Pelabuhan Klang constituency vacant due to Badrul Hisham, its State Assemblyman's absence from the State Legislative Assembly meetings for a period of six months without the leave of the Speaker. The Speaker explained the reasons for his action at a press conference and in a statement issued by him.

[194] Badrul filed an originating summons seeking *inter alia* a declaration to the effect that the Speaker's decision to declare a vacancy of his seat was *ultra vires* art. 69 of the Selangor Constitution and/or is wrong and/or null and void. Badrul succeeded before both the High Court and the Court of Appeal.

[195] At the Federal Court, the decision was reversed when the Federal Court concluded that the Speaker's action in declaring Badrul's seat vacant at a press conference "was in exercise of his functions to regulate the internal affairs of the SLA and was immune from challenge in court". According to the Federal Court, "the declaration was purely made within the parameters set out by art. 69 of the Selangor Constitution. Secondly, the declaration was inevitably connected to the essential business of the SLA and was made in the performance of the Speaker's essential function as a Speaker."

[196] In reaching that conclusion, the Federal Court acknowledged that the State Legislative Assemblies enjoy privileges and powers which were guaranteed under art. 72(1) of the Federal Constitution and in the case of the Selangor State Legislative Assembly, under art. 77 and the Schedule to its State Constitution. Amongst the privileges guaranteed was the freedom of speech and debate or proceedings in the Assemblies, that such speech, debate or proceedings "shall not be liable to be impeached or questioned in any

court or tribunal out of the Assembly." In short, the speeches, debates or proceedings of the members of the State Assemblies enjoy immunity and are not justiciable matters to be adjudicated by a court of law.

[197] What is noteworthy is the Federal Court recognising that this issue of justiciability of parliamentary privileges has been discussed fairly extensively in a line of cases starting with *Lim Cho Hock v. Speaker, Perak State Legislative Assembly* [1979] 1 LNS 45; [1979] 2 MLJ 85, and, *Fan Yew Teng v. Government of Malaysia* [1976] 1 LNS 28; [1976] 2 MLJ 262. In *Fan Yew Teng*, the landmark decision of *Bradlaugh v. Gossett* [1884] 12 QBD 271 was cited and discussed, and I shall return to this shortly. Two further significant decisions of the Federal Court were also examined *YAB Dato Dr Zambry Abd Kadir & Ors v. YB Sivakumar Varatharaju Naidu; Attorney General Malaysia (Intervener)* [2009] 4 CLJ 253); and *Dewan Undangan Negeri Selangor & Ors v. Mohd Hafarizam Harun* [2016] 7 CLJ 143.

[198] The Federal Court examined these decisions together with several other English authorities, the intent, as I see it, is to take stock and establish whether the approach on this by no means simple issue; whether there is a necessary and material distinction drawn between the decisions taken in-house or outside the parameters of the House (whatever that term may connote) such that the parameters have to be properly and clearly demarcated; whether the approach and considerations thus far have to revisit.

[199] After careful and deliberate examination of all those decisions, the Federal Court concluded in clear unequivocal terms that it was convinced that:

> ... there can be no doubt that *the business of Parliament and the State Legislative Assemblies are immune from judicial interference. The Courts have no power to interfere with the internal management of Parliament or any State Legislative Assembly. This immunity arises from the doctrine of separation of powers between the three principal organs of government*, namely the executive, the legislature and the judiciary.
>
> (emphasis added)

[200] The view of the Federal Court is crystal clear – the doctrine of separation of powers between the Executive, Legislative and the Judiciary requires the business of and how Parliament and the State Legislative Assemblies manage themselves in the conduct of their business, to be immune or protected from judicial interference. From this decision as well as the decisions examined by the Federal Court, it is apparent too that there is no change in the court's stance on this principle, that this has always been the approach, and this is evident even in *Lim Cho Hock* and both decisions of *Fan Yew Teng v. Setia Usaha, Dewan Ra'ayat & Ors* [1975] 1 LNS 39; [1975] 2 MLJ 40, and *Fan Yew Teng v. Government of Malaysia*, although the Federal Court only referred to the latter of the two decisions. On the contrary, any attempt to revisit and reset the approach was turned down quite categorically and firmly by the Federal Court.

[201] It is often overlooked what actually happened in the two cases involving *Fan Yew Teng* and I find it useful to take a quick look at these two cases and the decision in *Lim Cho Hock*. These decisions must however, be read with some care given that art. 48, as it now stands, was amended with effect from 16 December 1983, after these decisions. Clauses (4) and (5) were added to art. 48 *vide* Act A566. These amendments deal with the peculiar disqualification issues that arose in *Fan Yew Teng*; such amendments being necessary in view of the process and implications of appeals in criminal matters. Although the issue of justiciability was not specifically raised in the first of the two cases involving Fan, it is apparent that the court tacitly accepted and respected the principle of parliamentary privilege.

[202] Furthermore, while the court may have examined the matter of disqualification in the context of art. 48(1)(e) read together with arts. 50(1) and 53 because of the nature of the disqualification under consideration where there are more elaborate provisions on how to deal with this specific disqualification by reason of conviction and sentence, the deliberations and observations of the court in both decisions nevertheless apply equally to both the business of Parliament and the State Assemblies, and certainly, are of great significance and much help in the instant appeals. And, in my estimation, the views expressed by Mohamed Azmi J and Chang Min Tat J, remain relevant.

[203] Both of these decisions relate to the matter of disqualification and membership of Fan Yew Teng [Fan] who had been returned a Member of Parliament for the Parliamentary Constituency of Menglembu in the general elections held in August of 1974. On 13 January 1975, Fan was convicted at the High Court for an offence under the Sedition Act 1948 (Revised 1979) and sentenced to a fine of $2000 or six months imprisonment. Fan promptly appealed. By letter dated 4 February 1975, he was informed by the Setia Usaha, Dewan Ra'ayat, presumably on the direction of the Speaker, that on his conviction and sentence as aforesaid, he had become disqualified under art. 48(1)(e) of the Federal Constitution, and by virtue of art. 50(1), his seat had become vacant. A writ of election was issued by the Secretary to the Election Commission for the purpose of a by-election.

[204] Fan filed an originating summons seeking a declaration on the issue of whether his conviction and sentence automatically rendered his seat vacant in the Dewan Ra'ayat having regard to art. 53 of the Federal Constitution, the terms of which are set out for ease of reference and better appreciation of the arguments:

> 53. (1) If any question arises whether a member of a House of Parliament has become disqualified for membership, the decision of that House shall be taken and shall be final:
>
> Provided that this art. shall not be taken to prevent the practice of the House postponing a decision in order to allow for the taking or determination of any proceedings that may affect the decision (including proceedings for the removal of the disqualification).

(2) Where a member of either House of Parliament becomes disqualified under para. (e) of Clause (1) of art. 48 or under a federal law made in pursuance of Clause (2) of art. 48, Clause (1) shall not apply and he shall cease to be a member of that House, and his seat shall become vacant, immediately upon his disqualification taking effect in accordance with Clause (4) of art. 48.

[205] In the first decision, Fan argued that his disqualification was not automatic and that he was entitled to show cause against any move to exclude him from the Dewan under art. 53 of the Federal Constitution. The defendant disagreed, contending that art. 53 applied only where the disqualification was doubtful and not where it is straightforward as is Fan's disqualification.

[206] The issue before Mohamed Azmi J was on the interpretation and application of art. 53 read together with arts. 48 and 50(1).

[207] In dealing with the matter, Mohamed Azmi J *inter alia* observed, in passing, that the Federal Constitution does not confer on the House the power to decide elections in disputes. Instead, the Federal Constitution confers on the House the power to decide on questions relating to the disqualification and membership of its members. And, when it comes to such questions, His Lordship found that once a question has arisen as to disqualification, it is "abundantly clear ... that art. 53 gives the House of Parliament the over-riding power to make decision as to disqualification. I find no other provision in the Constitution to suggest that the power to decide on the question of disqualification being given to any other body or person." see p. 43.

[208] In coming to that finding and view, Mohamed Azmi J agreed with the submissions of both counsel that "the two Houses of Parliament are supreme and, if that is so, it follows that they should have the right to decide for themselves whenever a question or dispute arises as to membership amongst their members". His Lordship further found that "where a question or dispute has arisen whether a Member of Parliament has become disqualified, the seat of that particular member shall only become vacant when he becomes disqualified and the power to decide whether he becomes disqualified or not clearly rests with the Dewan to which he belongs by virtue of art. 53."

[209] In other words, the House must be allowed to take the decision on whether its member has become disqualified. It starts with the House taking that question and making a determination. And, when a decision is indeed taken, that decision is final. It is also final as there is no other body or person who is empowered to make that determination.

[210] Although art. 53 gives the House the power to decide on disqualification even where the member has not fully exhausted his legal rights against the conviction and sentence, Mohamed Azmi J recognised that

A the proviso to art. 53 leaves it open to "the House to postpone a decision in order to allow for the taking or determination of any proceedings that may affect its decision including proceedings for the removal of the disqualification of the member concerned". The House, of course, may choose not to postpone, illustrating thus the ambit and scope of that
B jurisdiction.

[211] In support for the opinion expressed, Mohamed Azmi J cited Suffian FJ's views expressed at p. 55 in his book entitled "*An Introduction to the Constitution of Malaysia*":

> C If a member of either House becomes disqualified for membership of that House, article 50(1) says that "his seat shall become vacant." It does not appear, however, that if, for instance he is declared a bankrupt, he automatically ceases to be a member, for article 53 provides **that if any question arises whether a member has become disqualified for membership, the decision of the House shall be taken and shall be final**.
> D Court proceedings may, however, be taken that affect the decision and thereby the matter becomes sub judice or an application may be made to the Yang Dipertuan Agong to remove certain disqualifications; in either event the House may, if it likes, postpone a decision to allow such proceedings or application to be taken or made and determined.
>
> E (emphasis added)

[212] His Lordship then pronounced that Fan was entitled to exhaust his legal rights just as the House was entitled to decide on Fan's disqualifications at any time it deems fit. This would be by reason of the proviso to art. 53.

[213] To me, the above arguments and the terms of the proviso implicitly
F recognise the right of the House to, itself, take a decision on a question of membership, including a disqualification of such membership. This option signifies that the jurisdiction and "over-riding power" lies with the House, and also the State Legislative Assemblies, to deal with this issue of disqualification and membership of its members. That jurisdiction is
G inherently part of the principle of parliamentary privilege enjoyed by all Parliamentarians and State Assemblymen.

[214] Moving then to the second case of *Fan Yew Teng v. Government of Malaysia*, the decision cited and relied on by the Federal Court in *Teng Chang Khim v. Badrul Hisham Abdullah*. Against the same factual backdrop as in the
H earlier case, a motion was passed in the Dewan Rakyat that the question whether by reason of the conviction and sentence the plaintiff had become disqualified for membership of the House be referred to the Committee of Privileges and that the Committee be instructed to report to the House. Pending the report of the Committee, and, as described by the learned judge,
I believing and fearing, "probably not without reason", that the process to disqualify him had started, the plaintiff applied to court for *inter alia* the following declarations:

(1) that no question under article 53 of the Federal Constitution as to the plaintiff's disqualification for membership of the Dewan Rakyat has risen by the plaintiff's mere conviction and fine of $2000 in default six months' imprisonment on January 13 1975 (*vide* Selangor Criminal Trial No. 4 of 1974) on a charge under section 4(1)(c) of the Sedition Act (Revised 1969);

(3) that under article 53 of the Federal Constitution it is the Dewan Rakyat alone and no other authority or body which can go into the question relating to the plaintiff's disqualification as a member of the Dewan Rakyat.

[215] The defendant filed an application to strike out the originating summons, *inter alia* on the ground that the reliefs were designed to prevent members of the Dewan from proceeding with a lawful part of parliamentary process of the Dewan.

[216] Chang Min Tat J agreed with the defendant and Fan's application was dismissed. His Lordship was unequivocal in his findings that the reliefs sought by the plaintiff "are outside the jurisdiction of the court." This conclusion was reached on strong and sound reasoning and I see no reason whatsoever not to adopt the same in the present appeals.

[217] It was the insightful opinion of Chang Min Tat J that when it comes to parliamentary privileges, there are privileges enjoyed by the Dewan as well as privileges enjoyed by the individual members. Adopting Basu's view expressed in his Commentary on the Constitution of India, His Lordship opined that the justification for both privileges is however, the same, that is, in order that there be effective discharge of the functions of the House, its members must be "allowed to participate in its functions without disturbance or interruptions". Consequently, His Lordship concluded that it was established "clearly and beyond argument that the question whether a member of the Dewan Rakyat has become disqualified from membership by reason of his conviction and in this case, a fine of not less than $2000 is a matter concerning the combined privileges of the Dewan as well as the individual privileges of the member."

[218] Having accepted that first principle, His Lordship was conscious as to the "real question", which is, what is the proper role of the court in such matters, or "what role the court has". This question seems to surface interminably despite these firm decisions of the court; as it did in these and the present appeals.

[219] Be that as it may, it will be readily seen from His Lordship's erudite deliberations, an admission that the control of each House over its internal proceedings is absolute and cannot be interfered with by the courts; that the courts have always refused to interfere in the application by the House of any of its recognised privileges. His Lordship reached this conclusion and admission after careful weightage of the various principles at play, and it would be useful if those deliberations are carefully considered as the parties

A in these appeals have once again, urged the courts to play a role in matters concerning decisions taken in Parliamentary or State Legislative Assembly proceedings. In my respectful view, any role played by the court, if there is one, is necessarily limited and circumscribed by this principle of parliamentary privileges. And, when it comes to matters taken within the
B business of the House, the courts refrain from interfering.

[220] Chang Min Tat J examined the approach in England and India since these two jurisdictions had seen a "large number of cases" on this question concerning the court's role. The English position, as summarised in *Erskine May's Parliamentary Procedure* (17th edn) at p. 173, is a position reached by
C "tacit consent" where "the old dualism remains" – the decisions of the courts are not accepted as binding by the House on matters of privilege, nor the decisions of the House by the courts. His Lordship, however ventured to suggest that "since the House of Commons has not for a hundred years refused to submit its privileges to the decision of the courts, it may be said
D to have given practical recognition to the jurisdiction of the courts over the existence and extent of its privileges. On the other hand, the courts have always, at any rate at the last resort, refused to interfere in the application by the House of any of its recognised privileges."

[221] His Lordship further found, speaking in even stronger terms, *S.A. de*
E *Smith*'s opinion expressed in *S.A. de Smith's Judicial Review of Administrative Action* (3rd edn), that the "courts have no jurisdiction to restrain by injunction, or otherwise to pass upon, any conduct that forms part of proceedings in Parliament, even though the matter in issue is not directly connected with the process of legislation." Citing *Bradlaugh v. Gossett* [1884]
F 12 QBD 271, the writer added:

> Assuming that the plaintiff was right in his contention that the order of the House was based upon the misconstruction of a statute, nevertheless the courts had no jurisdiction to interfere, **for the matter fell exclusively within the scope of the privilege of the House to regulate its own**
G **internal proceedings**.
>
> (emphasis added)

[222] As for the situation in India, His Lordship noted that the Supreme Court of India had refused to follow the English cases of *Bradlaugh v. Gossett* as well as *The Sheriff of Middlesex* [1840] 113 ER 149, and *Howard v. Gossett*
H [1845] 116 ER 139. The cases of *Sharma's case AIR* [1959] SC 395 and *Special Reference No. 1 of 1964* AIR 1965 SC 1893 were considered. Both cases deal with the validity of general warrants issued by the Speaker of a House of Parliament to punish for contempt of the privileges of the House; and the issue was whether such warrants could be scrutinised by the court.

I **[223]** In answer to the notice to show cause issued and the action intended to be taken under the powers, privileges and immunities of the House as provided under art. 194(3), the complainant in *Sharma*'s case claimed that there was a violation of certain of his fundamental rights guaranteed under

the Indian Constitution. By majority, the Supreme Court held that the power to punish for contempt was a subsisting privilege of the House and, that there was no contravention of art. 21 safeguarding the right to protection of life and personal liberty except according to procedure established by law. The Supreme Court also applied a harmonious construction of the several provisions of the Constitution, holding that where there is a direct conflict between arts. 194(3) and 19(1)(a) [free speech and expression], the particular provision in art. 194(3) would prevail over the general provision in art. 19(1)(a).

[224] The decision in *Sharma* was revisited in Special Reference No. 1 of 1964. In this latter decision, the Supreme Court clarified that its earlier decision in *Sharma* did not lay down any general proposition that whenever there is any conflict between art. 194(3) and any of the provisions concerning fundamental rights, "the latter must always yield to the former". Article 194(3), however, did not confer on any Indian Legislature the right to commit by a general warrant which could not be examined by the courts. The validity of such warrants could still be examined through *habeas corpus* or other proceedings. Lastly, the Supreme Court found that under art. 212 of the Indian Constitution, if the impugned procedure was illegal and unconstitutional, it would be open to the court to scrutinise the question of its validity. What is prohibited is where the complaint is only on an irregularity of any proceedings in the Legislature of a State.

[225] Having examined the jurisprudence from these two jurisdictions, Chang Min Tat J both cautioned and reminded himself on the similarities and differences between India and us. While we, like India, have a written Constitution, discerning the intention of the Constitution requires one to turn to the particular provisions of our Constitution to draw out whatever the intention. But, unlike India, parliamentary privileges are not spelt out under the Federal Constitution or any of the State Constitutions. Unlike India where the scrutiny of the court is restricted to the validity of any proceedings in the State Legislature or Parliament, Chang Min Tat J noted that there is specific provision in art. 63 prohibiting the questioning in any court of law the validity of any proceedings in either House of Parliament or any committee thereof. The terms of art. 63 thus, put paid to Fan's complaint; which as it were, turned out to be a complaint that the court should tell the Dewan not to take any decision until Fan's appeal to the Privy Council and his application for pardon had been disposed with. Even in this respect, "on the proper and reasonable construction of this conditional clause", His Lordship was of the view that it was for Fan to make that submission to the Dewan, the forum where the decision is to be taken; and not "a matter for the interference of the court."

[226] Yet another distinction drawn by His Lordship is the difference between constitutional rights and legal rights. In India, the power given by the Indian Constitution to its High Court and the Supreme Court by arts. 226

A and 32 respectively to issue directions, orders or writs for the enforcement of any of the rights conferred by Part III, ie, the fundamental rights or for any other purpose, these provisions are "absent from the Federal Constitution. The right is conferred by r. 1 of the Schedule to the Courts of Judicature Act 1964; and while I do not conceive that any High Court in this B country will have any less hesitation in enforcing the fundamental liberties of the subject or citizen by entertaining such actions than the courts in India, there is still a distinction between a legal right and a constitutional right, however slight it may be."

[227] Chang Min Tat J acknowledged that Fan's claim to continue to sit as C a member of the House is actually a claim of a particular privilege of members of State Legislative Assemblies. Since there were no challenges or complaints of conflict between his fundamental liberties and the particular privilege, His Lordship held:

> D On this construction, I must necessarily go on to hold that this court cannot interfere with the right of the Dewan to decide the question of the plaintiff becoming disqualified for membership or the corresponding right of the Dewan under the proviso to art. 53 to decide, if so minded, postponing taking a decision in order to allow for the appeal to be heard or for the plaintiff to make an application for pardon.

E **[228]** More interestingly were these strong concluding remarks made in relation to why the defendant's objection to being cited as a defendant were justified:

> As to the question whether the Government of Malaysia is wrongly cited as the defendant to these proceedings, the contentions of the plaintiff, put F in a nutshell are that the Government is a necessary party because it is interested in his expulsion and anyone who is interested could be cited as a defendant. The latter contention is plainly untenable. The former, when examined, obviously ignores the doctrine of the separation of powers provided in our Constitution and however Government as distinct from members of the Legislature may be said to be interested, **it also** G **ignores the fact that in the final say, it is the House itself which is concerned with and which alone has the powers to determine the question of its membership**. The plaintiff himself must know this to be the whole truth. To be a member of the House does not necessarily mean that the member is a part of the Executive or Government. This is true as much for back-benchers as for members of the Opposition. To contend H otherwise is to denigrate from the dignity and standing of the House as one arm of the sovereignty of the nation.
>
> This will be readily appreciated when it is realised that one of the most important of the Speaker's functions is to protect the House against the powers and encroachments of the Executive and to protect minorities I within the House itself ...
>
> The high water mark of the independence of the House of Commons from the Executive was reached in the reign of Charles I when Speaker Lenthall resisted the attempt of the Monarch to look for an arrest five

members of the House of Commons in these classic words: "May it please Your Majesty, I have neither the eyes to see nor tongue to speak in this place, as this House doth direct me, whose servant I am." Whether the independence of the Dewan Ra'ayat is to reach and be maintained at this mark, *it is for the members, amongst them, the plaintiff himself, as elected representatives of the electorate in their separate constituencies for whom they speak, to decide, but quite clearly, in respect of the disqualification of the plaintiff, neither Datuk Mohamed Rahman nor any member of the Government is interested or can vote save as a member of the House.*

(emphasis added)

[229] Despite the passage of time, I do not see any difference between Fan's claims and the approach adopted by the two learned judges in those two cases, with the plaintiff's claim in the present appeals. Both decisions concern the question of the member's disqualification and membership in the House or State Legislative Assembly, as the case may be. It is a claim of privilege of membership of the State Legislative Assembly and a right to have a seat in that Assembly. Such matters come squarely within the realm of privileges of Parliamentarians and State Assemblymen, and as held thus far in these two decisions, are matters outside the jurisdiction of the court. In my opinion, any issue or question concerning that disqualification and membership comes entirely within the compass of matters entrusted to the State Legislative Assembly to take. Once taken at its proceedings, the decisions enjoy immunity from scrutiny by the courts of justice. This respect for that parliamentary privileges is part of the high doctrine of the separation of powers.

[230] I find further support for this view in *Lim Cho Hock* where the applicant was a member of the Perak State Legislative Assembly. He approached the court for *inter alia* a declaration that the Speaker's seat was vacant by reason of "constitutional incapacity". The applicant claimed that since the Speaker had not taken his oath as required under art. 47(1) of the Constitution of Perak read together with O. 1(c) of the Standing Orders of the Perak State Legislative Assembly, the Speaker's seat was therefore vacant.

[231] Upon examining the relevant provisions of the Constitution of Perak and the Standing Orders of the Perak State Legislative Assembly, Abdoolcader J said in clear and unequivocal terms:

I have already referred to the provisions of art. 72(1) of the Federal Constitution which might perhaps also affect the position as well as the originating summons in raising the matter of the first respondent not having taken the oath as a member of the Assembly although he had in fact taken the oath as Speaker after his election as such under Standing Order 1(c) of the Assembly's Standing Orders might appear in effect to question the validity of the internal proceedings of the Assembly.

A In the light of these constitutional provisions, **it is clear that the two matters raised in these proceedings are for the Assembly to decide and within its exclusive jurisdiction, and not for the courts to determine**.

Unlike the *lex et consuetudo* parliament, the Assembly has control over its proceedings, procedures, members and may decide questions as to their
B qualifications and disqualifications. The provisions in the Federal and State Constitutions I have discussed crystallise and encapsulate this important principle of non-justiciability of its intra-mural activities in the courts which may perhaps be appropriately termed the *Bradlaugh* principle, highlighted in *Bradlaugh v. Gossett* as a result of the House of Commons in England preventing an elected atheist from exercising his statutory right
C of making the member's oath by affirmation. The oath being a precondition to the right to participate in proceedings of the House, the plaintiff was thus prevented from taking his seat. **The court ruled that the matter was not justiciable before it only Parliament was competent to regulate and for that purpose judge the validity of its intra-mural activities**.

D (emphasis added)

[232] Therefore, in both the *Fan Yew Teng* cases and the decision in *Lim Cho Hock*, the courts have remained steadfast in the approach to this "real question" concerning the court's role; that the courts will refrain from
E interfering.

[233] Returning now to the Federal Court's recent decision in *Teng Cheng Khin v. Badrul Hisham* where, as pointed out, the Federal Court reaffirmed the principle or parliamentary privileges in the terms already set out and discussed. This principle is readily applicable where the impugned decision
F or act is one which is clearly within the business of the House or the State Legislative Assembly, and where the decision or act takes place in proceedings in the House or the State Assembly. The problem, if not, the difficulty lies where the impugned act or decision takes place outside the walls of the State Legislative Assembly or is a decision taken by a committee
G established by the Assembly; as was the position in almost all the decisions that will be discussed and which are post *Fan Yew Teng v. Government of Malaysia*.

[234] It would appear that in those circumstances, the argument seems to be whether the court should ask first and foremost, is there any legal authority,
H power or jurisdiction, inherent or express, to make or take that particular decision. It is only where there is power or jurisdiction to do so that the court will respect and accord the principle of parliamentary privilege guaranteed under art. 72 of the Federal Constitution. Where there is none, the matter is then said to be justiciable and within the purview of the court. This will
I become clearer when those decisions are considered.

[235] First, the Federal Court's latest decision in *Teng Chang Khim v. Badrul Hisham Abdullah* where on its peculiar facts, and this was Badrul's complaint, the act of the Speaker in declaring the seat of N46 Pelabuhan Klang

Constituency vacant was not made during the proceedings of the State Legislative Assembly; it was made at a press conference and in a statement issued by the Speaker. According to the Federal Court:

> [25] The crucial issue now is whether there exists circumstances where words or actions taking place outside the walls of Parliament or State Legislative Assemblies are also protected by the doctrine of parliamentary privilege.

[236] The Federal Court noted that a similar issue had arisen in *R v. Chaytor* [2010] 3 WLR 1707. A nine-member panel of the English Supreme Court had dismissed a defence of parliamentary privilege raised by Members of Parliament who had been charged with dishonestly submitting fraud claims for expenses allegedly incurred in travelling to Parliament. Although the Supreme Court upheld the principle of Parliament's exclusive jurisdiction over its internal affairs, that the courts will respect the right of the House to "reach its own decision in relation to the conduct of its affairs", the court rejected that contention on the basis that the submissions of travelling claims were completely unrelated to the internal business of the House. In considering whether actions outside the House and committees fall within "parliamentary proceedings" because of their connection to such proceedings, Lord Phillips MR said:

> ... **it is necessary to consider the nature of that connection and whether, if such actions do not enjoy privilege, this is likely to impact adversely on the core or essential business of Parliament**.
>
> (emphasis added)

[237] Given then the starting principle that this entrenched right of parliamentary privilege of immunity from court scrutiny, the pertinent question to pose really is whether if the parliamentary privilege is not accorded or enjoyed, will the core or essential business of Parliament be adversely impacted. And, this takes me back to the two *Fan Yew Teng* cases where it was expressly held that both the Dewan and its individual members enjoy immunity and privilege for the same reason, and that is to ensure that they can discharge their fundamental functions effectively without disturbance or interruption. Consequently, where the answer to the poser is in the affirmative, that the core or essential business of Parliament or State Legislative Assembly will be effectively discharged, the privilege must be recognised and the immunity enjoyed.

[238] To answer this question, it is therefore necessary to consider the nature of the connection between the impugned action or decision and the core or essential business of Parliament. On the facts in *R v. Chaytor*, the answer was in the negative. Hence, the immunity or claim of parliamentary privilege was not available.

[239] The Federal Court noted that the principle in *R v. Chaytor* was accepted and applied by the Federal Court itself in its earlier decision in *Teng Chang Khim v. Dato' Raja Ideris Raja Ahmad & Ors* [2014] 3 CLJ 173. This second decision of the Federal Court is equally insightful.

[240] In *Teng Chang Khim v. Dato' Raja Ideris Raja Ahmad*, a decision of the Federal Court also concerning the Selangor Legislative Assembly [SLA], the SLA had passed a motion to establish a Select Committee on Competence, Accountability and Transparency (SELCAT). The Speaker was the chairman of the committee whilst the committee members comprised elected members of the SLA. SELCAT's mandate was to conduct public hearings and evidence presented to SELCAT may be publicly disseminated or published. The respondent in the appeal *inter alia* challenged the composition of SELCAT, complained about its hearings and sought for a declaration that the formation of SELCAT and/or its proceedings are null and void and of no effect.

[241] At the High Court, the appellants' application to strike out the originating summons under O. 18 r. 19(1) of the Rules of the High Court 1980 and/or the inherent jurisdiction of the court, was allowed on the ground of non-justiciability and that SELCAT, as a committee of the SLA, enjoyed the same protection as proceedings of the SLA. The decision was however, reversed on appeal on the basis that there was a reasonable cause of action and that the originating summons should not be summarily struck out.

[242] The Federal Court disagreed with the Court of Appeal. Citing the Privy Council decision in *Rediffusion (Hong Kong) Ltd v. Attorney General of Hong Kong (PC)* [1970] AC 1136, the Federal Court was of the view that even where a case concerns a serious question of constitutional law, it may still be suitable for summary disposal under O. 18 r. 19. This, in fact, is one of the matters of appeal in the three appeals.

[243] As for the question of parliamentary privilege and thereby the justiciability or otherwise of the question of whether the resolution of the SLA establishing SELCAT with the composition, powers and workings as passed in the resolution, and this forms the nub of the instant appeals, the Federal Court acknowledged that parliamentary privileges was derived not only from English law but is in fact entrenched in art. 63(1) of the Federal Constitution and applied to the State by virtue of art. 72(1) of the Federal Constitution, and is now encapsulated in para. 2 of the Schedule to the Selangor State Constitution.

[244] It is interesting to note that after wrestling with this difficult but relevant question, the Federal Court firmly rejected the respondent's contention that relying on *Rediffusion*, that there was a shift in common law after *Bradlaugh v. Gossett* (*supra*); that the court has jurisdiction to enter upon the inquiry of whether or not it would be lawful for the Legislative Council of Hong Kong to pass a proposed bill and that if the answer was in the

negative, to decide in their discretion whether or not to grant the relief by way of a declaration and injunction. In *Rediffusion*, the Supreme Court of Hong Kong had held that the court had jurisdiction to enter upon such an inquiry. That decision was upheld on majority by the Privy Council with Lord Diplock pronouncing as follows:

> The immunity from control by the courts, which is enjoyed by members of a Legislative Assembly while exercising their deliberative functions is founded on necessity. The question of the extend of the immunity which is necessary raises a conflict of public policy between the desirability of freedom of deliberation in the legislature and the observance by its members of the rule of law of which the courts are the guardians. If there will be no remedy when the legislative process is completed and the unlawful conduct in the course of the legislative process will by then have achieved its object, the argument founded on necessity in their Lordships' view leads to the conclusion that there must be remedy available in a court of justice before the result has been achieved which was intended to be prevented by the law from which a legislature which is not fully sovereign derives its powers.

[245] The Federal Court further cautioned that the judgment of the Privy Council must be considered in the factual context of the case, and that the decision was also distinguishable from the facts in the particular appeal before the Federal Court. The legal principles that governed the jurisdiction of the English courts to interfere in the conduct of proceedings in the fully sovereign Parliament of the United Kingdom could not be applied in *Rediffusion* as the members of the Legislative Assembly in a colony did not enjoy all those privileges and immunity from control by the courts. According to the Federal Court:

> The constitutional position of the legislature in Hong Kong (at the material time) was different from the constitutional position of Parliament or the State Legislatures in Malaysia. First, the legislature of Hong Kong was not a representative legislature. None of its members was elected. All of them, including the unofficial members, were appointed by or on behalf of the Crown. Second, and more importantly, the legislature of Hong Kong was not a fully sovereign legislature. These are clear from the judgment of Lord Diplock ...

[246] The Federal Court opted instead, to continue to apply *Bradlaugh v. Gossett*, as generally understood and applied in this country. I must add that the Federal Court in *Teng Chang Khim v. Dato' Raja Ideris Raja Ahmad & Ors* accepted that the observations of the court were made in the context of *lex constuedo* of a Supreme Parliament. Nevertheless, the Federal Court did not lose sight of the fact that in Malaysia there is no concept of Parliamentary supremacy; that it is one of constitutional supremacy (see *Ah Thian v. Government of Malaysia* [1976] 1 LNS 3; and *YAB Dato Zambry Abd Kadir & Ors v. YB Sivakumar Varatharaju Naidu, Attorney General Malaysia (Intervener)* [2009] 4 CLJ 253).

[247] And, in this regard, arts. 63 and 72 of the Federal Constitution clearly provide that the validity of its proceedings are immune from questioning in any court. It was the view of the court that while the declaration sought in the originating summons may have been about the composition of SELCAT, in effect, it questioned the validity of the resolution of the State Assembly establishing SELCAT. That resolution, passed without objection, was made in exercise of the State Assembly's collective and deliberative functions. The validity of such a resolution consequently, could not be impeached or questioned in any court. The matter was therefore not justiciable and aptly should be struck out.

[248] In reaching that decision, the Federal Court accepted that in its earlier decision in *YAB Dato' Zambry Abd Kadir & Ors v. YB Sivakumar Varatharaju Naidu, Attorney General Malaysia (Intervener)*, it had held that art. 72(1) of the Federal Constitution must be read as being subject to the existence of a power or jurisdiction, inherent or express, to do whatever that has been done, and that the court was empowered to ascertain whether the power that has been claimed has been provided for, thereby rendering the issues raised in that case justiciable. However, the Federal Court was of the view that the decision in *Dato' Zambry* "should be read in the factual context of the case" and that the *ratio decidendi* to be distilled from the judgment should be limited accordingly.

[249] Ahmad Maarop FCJ, writing for the Federal Court in *Teng Chang Khim v. Dato' Raja Ideris Raja Ahmad*, was of the view that the alleged acts of contempt against the first applicant in *Dato' Zambry*, for holding himself out as Menteri Besar, against the other applicants for holding themselves out as Exco Members, for which they were all suspended, were all acts committed beyond the walls of the Legislative Assembly. The critical issue for the court's determination was whether provision had been made for such contempt. The Federal Court found that there was no specific legal authority to punish for contempt, whether under the Perak State Constitution, the Assembly's Standing Orders or even the Perak Legislative Assembly (Privileges) Enactment 1959. It was in that context that the Federal Court expressed the view that art. 72 must be read as being subject to the existence of a power or jurisdiction, whether inherent or expressly provided for, to do whatever that has been done.

[250] The Federal Court was mindful to State that it did not believe that the decision in *Dato Zambr*y "can be taken to have laid down the proposition that all acts of the Legislative Assemblies and that of their committees, or the Houses of Parliament and that of their committees are amenable to scrutiny and correction by the courts, because that will render meaningless the constitutional immunity guaranteed under art. 72(1) and art. 63(1) of the Federal Constitution and para. 2 in the Schedule to the Selangor Constitutions (as well as Constitutions of other States having similar

provisions).” As for the facts in *Teng Chang Khim v. Dato Raja Ideres itself*, the Federal Court was clear that the resolution concerning SELCAT was made within the walls of the Assembly, and was therefore not justiciable.

[251] In yet another decision concerning the State Legislative Assembly of Selangor, in *Dewan Undangan Negeri Selangor & Ors v. Mohd Hafarizam Harun* (*supra*), the Selangor State Legislative Assembly had passed a motion resolving that the respondent, an advocate and solicitor who, acting on his client's instruction had issued a letter of demand for payment of costs awarded in a civil suit filed by his client against the Speaker, be referred to the Committee of Rights and Privileges of the State Legislative Assembly because the letter contained language that was indecent, insolent and threatening.

[252] The court had no difficulty or hesitation in finding that the resolution was passed beyond the walls of the State Legislative Assembly. There were no provisions, be it in the State Constitution or the Standing Order and the Contempt of the House (State of Selangor) Enactment 2009 which conferred the power to punish for contempt committed outside the State Legislative Assembly. At para. 50 of its judgment, the Federal Court found that where “the respective Legislative Assemblies had exceeded its jurisdiction as provided under the Constitution of each State hence there was room for judicial interference.”

[253] From all these decisions, it may therefore, be reasonably concluded as follows:

First, the doctrine of parliamentary privileges is intrinsically part of the doctrine of separation of powers.

Second, this doctrine is enshrined in arts. 63 and 72 of the Federal Constitution; and in the case of the State Assembly of Sarawak, further, in art. 19 of its State Constitution.

Third, the doctrine of parliamentary privileges means that the House and the State Assembly, as the case may be, and its members, enjoy immunity from judicial interference.

Fourth, the existence of this doctrine of parliamentary privilege is to ensure effective discharge of the functions of the House or the State Assembly by both the House and the State Assembly and its respective members.

Fifth, the courts respect that privilege and will not interfere in any parliamentary proceedings or internal management or core business of the House or State Assembly.

Sixth, the court will not interfere in those parliamentary proceedings, internal management or core or essential business of the House where such interference will impact adversely on the core or essential business of the House or the State Assembly.

[254] From the decisions discussed, in particular the earlier decisions of *Lim Cho Hock* and *Fan Yew Teng*, and the recent decision of *Teng Chang Khim v. Badrul Hisham Abdullah*, it is also plain that the matter of membership and the disqualification or loss of membership of the House or the State Assembly, as the case may be, is intrinsically related to the management and core or essential business of the House or the State Assembly. Any interference or scrutiny of any decision or related to such decisions of membership or disqualification of membership by the court will undoubtedly, adversely impact or affect the efficient discharge by the members of their parliamentarian functions. These views have prevailed through these last 60 odd years with no shift in the approach by the courts.

[255] Having therefore set out the law in relation to the matter of justiciability of the issues before the court and thereby the jurisdiction of the court to attend to the issues presented, it must follow that the present appeals turn on whether the State Assembly has jurisdiction to deal with the matters contained in the ministerial motion moved under standing order 23(1)(a); whether such matters fall within the core or essential business of the State Assembly. It goes without saying that the ministerial motion was debated and voted upon by the members of the State Assembly. And, the State Assembly resolved that the plaintiff is "disqualified under art. 17(1)(g) of the Sarawak State Constitution to be a member and has ceased to be a member of the Dewan Undangan Negeri Sarawak forthwith".

[256] If the answer is in the affirmative, then following the decisions discussed thus far, the matters raised by the plaintiff are not justiciable. The court will therefore, not interfere and will instead, abide by the doctrine of parliamentary privileges.

Disqualification

[257] The terms and content of the ministerial motion have already been set out. It is irrefutable that the motion pertains to the disqualification and thereby the qualification of the plaintiff as member of the Sarawak State Assembly. The provisions of qualification and disqualification of a member of the State Assembly are to be found in arts. 16 and 17 of the Sarawak State Constitution.

[258] In this regard, the learned judge found that the plaintiff's disqualification as duly elected member of the State Assembly for the State constituency of Pujat (N74) by the first defendant pursuant to the ministerial motion dated 12 May 2017 moved by the second defendant and adopted by the State Assembly and/or the first defendant to be unconstitutional, in violation of art. 118 of the Federal Constitution, and is therefore null and void and of no effect. This decision was made on the following principal grounds:

(i) the ministerial motion calls into question the election of the plaintiff as the duly elected member as it sought, in actual fact, to remove the plaintiff as a member of the State Assembly by way of disqualification so that a by-election could be held by the Election Commission;

(ii) there are no provisions in the Federal Constitution and the State Constitution for the State Assembly to decide on matters related to pre-election disqualification;

(iii) the Federal Constitution does not confer on the House of Representatives or the State Assembly the power to decide elections in dispute but only question relating to the disqualification of members;

(iv) the State Assembly has no power to hear and adjudicate on matters such as citizenship of sitting members of the State Assembly as it involves legal and constitutional issues;

(v) that the State Assembly had embarked on a very simplistic argument that because the plaintiff had acquired Australian citizenship he is therefore disqualified following art. 17(1)(g) of the Sarawak State Constitution; nothing was said of the plaintiff's renunciation of the plaintiff's Australian citizenship prior to the State General Elections and the legal effect of the same;

(vi) the "proper forum to adjudicate where a pre-election violation is alleged and the election result is challenged" and where questions on the citizenship of the plaintiff, whether he had lost his Malaysian citizenship when he acquired Australian citizenship may be adjudicated on is the election court as provided under art. 118 of the Federal Constitution;

(vii) Article 17(1)(g) deals with the qualification of a person whereas arts. 18(2) and 19(1) deal with the cessation of qualification for election as a member;

(viii) it would be wrong and perverse to interpret art. 17(1)(g) as referring to a post-election disqualification;

(ix) the plaintiff did not lose his Malaysian citizenship when he acquired Australian citizenship even though Malaysia did not recognise dual citizenship;

(x) a plain reading of arts. 24 and 27 show that depriving of nationality and acceptance of renunciation requires a formal act of the Malaysian Federal Government; it is not automatic or irrevocable.

[259] When interpreting and construing the Federal Constitution, it is important to bear in mind that it is never to be conducted in the same manner as interpreting and construing statutes. This was expressed in *Madhuvita Janjara Augustin (Suing Through Next Friend, Margaret Louisa Tan) v. Augustin Lourdsamy & Ors* [2018] 4 CLJ 758; [2018] 1 MLJ 307:

A [36] The apex court has laid down the principles to be applied when interpreting and construing the Federal Constitution, the supreme law of the land. Two of those principles that come immediately to mind were expressed in *Dato' Menteri Othman bin Bagind & Anor v. Dato' Ombi Syed Alwi bin Syed Idrus* [1981] 1 MLJ 29 and *Dewan Undangan Negeri Kelantan v. Nordin bin Salleh* [1992] 1 MLJ 697. In *Dato' Menteri Othman bin Baginda*,
B Raja Azlan Shah, Ag. LP (as His Royal Highness then was) said:

> In interpreting a constitution two points must be borne in mind. First, judicial precedent plays a lesser part than is normal in matters of ordinary statutory interpretation. Secondly, a constitution, being a living piece of legislation, its provisions must be construed
C broadly and not in a pedantic way "with less rigidity and more generosity than other statutes" (see *Minister of Home Affairs v. Fisher*). A constitution is *sui generis*, calling for its own principles of interpretation, suitable to its character, but without necessarily accepting the ordinary rules and presumptions of statutory interpretation. As stated in the judgment of Lord Wilberforce in
D that case: "A constitution is a legal instrument given rise, amongst other things, to individual rights capable of enforcement in a court of law. Respect must be paid to the language which has been used and to the traditions and usages which have been given meaning to that language. It is quite consistent with this, and with the recognition that rules of interpretation may apply, to take as a
E point of departure for the process of interpretation a recognition of the character and origin of the instrument, and to be guided by the principle of giving full recognition and effect to those fundamental rights and freedoms." The principle of interpreting constitutions "with less rigidity and more generosity" was again
F applied by the Privy Council in *Attorney General of St Christopher, Nevis and Anguilla v. Reynolds*.

[37] This approach was adopted and applied by the Supreme Court in *Dewan Undangan Negeri Kelantan v. Nordin Salleh with Abdul* Hamid Omar LP citing again the Privy Council's decision in *Minister of Home Affairs v. Fisher*, that a constitution based on the *Westminster* model must not be
G treated as if it were an Act of Parliament and that "a constitution should be construed with less rigidity and more generosity than other statutes and as *sui juris*, calling for principles of interpretation of its own, suitable to its character but not forgetting that respect must be paid to the language which has been used." The Lord President cited Barwick CJ who, in the decision of the High Court of Australia in Attorney General
H of the *Commonwealth, ex relation McKinley v. Commonwealth of Australia* [1975] 135 CLR 1, p 17 said:

> ... the only true guide and the only course which can produce stability in constitutional law is to read the language of the constitution itself, no doubt generously and not pedantically, but
I as a whole and to find its meaning by legal reasoning.

[38] In *Dewan Undangan Negeri Kelantan v. Nordin bin Salleh*, the Supreme Court further shared the view of the Privy Council expressed in *Ong Ah Chuan v. PP* [1981] AC 648. Although that was a decision on the Constitution of the Republic of Singapore, it is nevertheless noteworthy in relation to the approach when interpreting a constitution of a nation, that a "generous interpretation is suitable, avoiding what has been called "the austerity of tabulated legalism". The Supreme Court also adopted the view of the Supreme Court of India in *OK Ghosh v. EX Joseph* [1963] SC 812 that an interpretation rendering the Constitution ineffective and illusory ought to be avoided.

[260] Thus, in construing and interpreting the Federal Constitution, the construction must not be austere, rigid or pedantic. Instead, it should be more broad and generous, suitable to the character of the Federal Constitution as the supreme law of the nation although respect of course, must be paid to the language used.

[261] This is not to say that the general principles in interpretation are not applicable. A purposive approach (referred to by Lord Simon in *Maunsell v. Olins* [1975] AC 373 as the "common sense approach") may still have to be considered, the principles of which are well set out in the Federal Court decision of *Andrew Lee Siew Ling v. United Overseas Bank (M) Sdn Bhd* [2013] 1 CLJ 24; [2013] 1 MLJ 449. At pp. 35-36 (CLJ); p. 458 (MLJ), the Federal Court addressed the proper application of s. 17A of the Interpretation Acts 1948 and 1967:

On the proper application of the provision of the said s. 17A of the Interpretation Act we would refer to the case of *All Malayan Estates Staff Union v. Rajasegaran & Ors* [2006] 6 MLJ 97 wherein this court had laid down the principles, *inter alia*, as follows:

> In summarising the principles governing the application of the purposive approach to interpretation, *Craies on Legislation* (8th Ed), says at p 566:
>
> (1) Legislation is always to be understood first in accordance with its plain meaning.
>
> (2) Where the plain meaning is in doubt the courts will start the process of construction by attempting to discover, from the provisions enacted, the broad purpose of the legislation.
>
> (3) Where a particular reading would advance the purpose identified, and would do no violence to the plain meaning of the provisions enacted, the courts will be prepared to adopt that reading.
>
> (4) Where a particular reading would advance the purpose identified but would strain the plain meaning of the provisions enacted, the result will depend on the context and, in particular, on a balance of the clarity of the purpose identified and the degree of strain on the language.

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(5) Where the courts conclude that the underlying purpose of the legislation is insufficiently plain, or cannot be advanced without any unacceptable degree of violence to the language used, they will be obliged, however regretfully in the circumstances of a particular case, to leave to the legislature the task of extending or modifying the legislation.

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The choice prescribed in s. 17A of '... a construction that would promote the purpose or object underlying the Act ... shall be preferred to a construction that would not promote that purpose or object ...' can only arise when the meaning of a statutory provision is not plain and is ambiguous. If therefore, the language of a provision is plain and
C unambiguous s. 17A will have no application as the question of another meaning will not arise. Thus, it is only when a provision is capable of bearing two or more meanings can s. 17A be resorted to in order to determine the one that will promote the purpose or object of the provision, such an exercise must be undertaken without doing any violence to the plain meaning of the provision. This is a legislative
D recognition of the purposive approach and is in line with the current trend in statutory interpretation ...

[262] When construing any provision, it is the whole instrument or the whole of the relevant part of the instrument that must be examined in order to discern the meaning intended and to give effect to such intention. The
E purpose being to give effect, as far as it is possible, to all its provisions; "unless there is some clear reason to the contrary, no portion of the fundamental law should be treated as superfluous" see the Federal Court in *Dato Seri IR Hj Mohammad Nizar Jamaluddin v. Dato Seri Dr Zambry Abd Kadir; Attorney General (Intervener)* [2010] 2 CLJ 925, 941, citing in turn *Danaharta*
F *Urus Sdn Bhd v. Kekatong Sdn Bhd* [2004] 1 CLJ 701. In other words, the whole and the relevant chapter of the Federal Constitution must be taken into account.

[263] Returning then to this seemingly innocuous question of disqualification of the plaintiff which question is intrinsic to the matter of
G qualification of the plaintiff as a member of the State Assembly, it is necessary to conduct a very careful examination of the terms of art. 17 of the Sarawak State Constitution, not only of itself but together with other provisions in the Federal Constitution, Sarawak State Constitution and any law mentioned in art. 17 itself. In particular, regard must be given to
H arts. 16, 18 and 19 as these are specific provisions on qualifications of membership, disqualification of membership, tenure of seats of members, and decision as to disqualification. These provisions are set out as follows:

Qualifications of members

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16. Every citizen of or over the age of twenty-one years who is resident in the State is qualified to be elected as an elected member of the Dewan Undangan Negeri, unless he is disqualified for being such a member by the Federal Constitution or this Constitution or by any such law as is mentioned in art. 17.

Disqualifications for membership

17. (1) Subject to the provisions of this article, a person is disqualified for being elected as an elected member of the Dewan Undangan Negeri if:

(a) he is and has been found or declared to be of unsound mind;

(b) he is an undischarged bankrupt;

(c) he holds an office of profit other than that of a Native Chief;

(d) having being nominated for election to either House of Parliament or to the Dewan Undangan Negeri or having acted as election agent to a person so nominated, he has failed to lodge any return of election expenses required by law within the time and in the manner so required;

(e) he has been convicted of an offence by a court of law in any part of the Federation and sentenced to imprisonment for a term of not less than one year or to a fine of not less than two thousand ringgit and has not received a free pardon in respect thereof;

(f) he is disqualified under any law relating to offences in connection with elections to either House of Parliament or to the Dewan Undangan Negeri by reason of having been convicted of such an offence, or having in proceedings relating to such an offence been proved guilty of an act constituting such an offence; or

(g) he has voluntarily acquired citizenship of, or exercised rights of citizenship in, any country outside the Federation or has made a declaration of allegiance to any country outside the Federation.

(2) (Deleted by Ord. No. 9/1968)

(3) The disqualification of a person under para. (d) or para. (e) of Clause (1) may be removed by the Yang di-Pertuan Negeri and shall, if not so removed, cease at the end of the period of five years beginning with the date on which the return mentioned in para. (d) of that Clause was required to be lodged, or, as the case may be, on the date on which the person convicted as mentioned in para. (e) of that Clause was released from custody, or the date on which the fine mentioned in that paragraph was imposed; and a person shall not be disqualified under para. (g) of Clause (1) by reason only of anything done by him before he became a citizen.

(4) Notwithstanding anything contained in the foregoing provisions of this Article, where a member of the Dewan Undangan Negeri becomes disqualified from continuing to be a member thereof pursuant to para. (e) of Clause (1), or under a law as is referred to in para. (f) of Clause (1):

(a) the disqualification shall take effect upon the expiry of fourteen days from the date on which he was:

(i) convicted and sentenced as specified in the aforesaid para. (e); or

(ii) convicted of an offence or proved guilty of an act under a law as is referred to in the aforesaid para. (f); or

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(b) if within the period of fourteen days specified in para. (a) an appeal or any other court proceedings is brought in respect of such conviction or sentence, or in respect of being so convicted or proved guilty, as the case may be, the disqualification shall take effect upon the expiry of fourteen days from the date on which such appeal or other court proceeding is disposed of by the court; or

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(c) if within the time period specified in para. (a) or the period after the disposal of the appeal or other court proceeding specified in para. (b) there is filed a petition for a pardon, such disqualification shall take effect immediately upon the petition being disposed of.

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(5) Clause (4) shall not apply for the purpose of nomination or election of any person to the Dewan Undangan Negeri, for which purpose the disqualification shall take effect immediately upon the occurrence of the event referred to in para. (e) or (f), as the case may be, of Clause (1).

(6) A person who resigns his membership of the Dewan Undangan Negeri of this State or the Legislative Assembly of any other State, shall, for a

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period of five years beginning with the date on which his resignation takes effect, be disqualified from being a member of the Dewan Undangan Negeri of this State.

(7) (a) Any person who has voluntarily given an undertaking to the Speaker in writing that he will not resign his membership from the

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political party for which he stood or to which he belongs when he is elected to the Dewan Undangan Negeri, shall, if he resigns from the political party after being elected, be disqualified in the interest of public integrity and morality from continuing to be a member of the Dewan Undangan Negeri with effect from the date he resigned from the political party.

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(b) For the avoidance of any doubt, it is hereby declared that this Clause shall not be taken as imposing restrictions on any person from becoming a member of any political party, permanently or otherwise.

Tenure of seats of members

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18. (1) Every elected member of the Dewan Undangan Negeri shall vacate his seat in the Dewan on a dissolution of the Dewan.

(2) An elected member shall also vacate his seat in the Dewan if-

(a) he ceases to be qualified for election as such a member of the

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Dewan;

(b) he resigns his seat by writing under his hand addressed to the Speaker;

(c) he is absent without the leave of the Speaker from every sitting of the Dewan for three consecutive meetings;

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(d) (Deleted ...)

(e) (Deleted ...)

(3) For the purposes of para. (c) of Clause (2), "meeting" means any sitting or sittings of the Dewan commencing when the Dewan first meets after being summoned at any time and terminating when the Dewan is adjourned *sine die* or at the conclusion of a Session.

(4) (Deleted ...)

Decision as to disqualification

19. (1) If any question arises whether the Speaker or a member of the Dewan Undangan Negeri has ceased to be qualified for appointment or election as such, the decision of the Dewan shall be taken and shall be final:

Provided that this Article shall not be taken to prevent the practice of the Dewan postponing a decision in order to allow for the taking or determination of any proceedings that may affect the decision (including proceedings for the removal of the disqualification).

(2) Where a member of the Dewan Undangan Negeri becomes disqualified under para. (e) of Clause (1) of art. 17, or under a law as is referred to in para. (f) of Clause (1) of art. 17, the foregoing Clause (1) shall not apply, and he shall cease to be a member of the Dewan Undangan Negeri, and his seat shall become vacant, immediately upon his disqualification taking effect in accordance with Clause (4) of art. 17.

[264] As pointed out earlier, in the reading of the above provisions, regard must be given to arts. 47, 48, 49, 50 and 53 of the Federal Constitution, the terms of which run substantially similar to those found in the Sarawak State Constitution as mentioned above.

[265] Now, pursuant to art. 16 of the Sarawak State Constitution, there are four fundamental qualifications that every person who wants to be elected member of the State Assembly must have. These fundamentals relate to citizenship, age, residency and the absence of disqualification.

[266] Only citizens of the Federation qualify. Next, that citizen must be aged 21 years or over. Third, that 21 year old or over citizen must be resident in the State of Sarawak. Finally, that citizen must not suffer from any of the disqualifications specified in the Federal Constitution, the Sarawak State Constitution or by any law mentioned under art. 17.

[267] There is no dispute that the plaintiff meets the age and residency qualifications. It is also undisputed that the plaintiff is a Malaysian citizen. It is further not in dispute that the plaintiff was never deprived of his Malaysian citizenship. As mentioned by the learned judge, while Malaysia does not recognise dual citizenship, any deprivation of citizenship may only be validly undertaken by the Federal Government pursuant to arts. 24 and 27 of the Federal Constitution, or if it was voluntarily renounced by the plaintiff himself under art. 23 of the Federal Constitution. Until to date, there

A is no evidence or indication to this effect. On the contrary, there is confirmative evidence that the plaintiff is a Malaysian citizen. Therefore, the issue of the plaintiff losing his Malaysian citizenship as a result of him voluntarily acquiring Australian citizenship or not being a Malaysian citizen, does not arise.

B **[268]** That, however, only deals with part of the issue of qualification. From the clear terms of art. 16, the qualifications to be a member of the State Assembly include the absence of any of the disqualifications stipulated in art. 17. In other words, a citizen aged 21 years or over resident in the State of Sarawak may still not be qualified under art. 16 if that citizen suffers any
C of the disqualifications spelt out under art. 17. Therefore, the matter of qualification necessarily entails the matter of disqualification. This position pertains under both the Sarawak State Constitution and the Federal Constitution – see art. 47 of the Federal Constitution.

D **[269]** Article 17(1) provides for seven disqualifications. I agree with the submissions of learned counsel for the plaintiff that these disqualifications need to be carefully scrutinised as each operates distinctively, separate from the others. Articles 17(6) and (7) also deal with disqualifications by reason of resignation whether from membership of the State Assembly or from the political party for which the member stood or to which he belonged when
E elected; these are, however, irrelevant for the present appeals.

[270] What is relevant are the seven disqualifications set out in art. 17(1), summarised as follows:

(i) unsound mind;

F (ii) undischarged bankrupt;

(iii) holds office of profit other than that of a Native Chief;

(iv) failing to lodge the requisite return of expenses within the prescribed time and manner;

G (v) conviction of an offence by a court of law and sentenced to imprisonment for a term of not less than one year or to a fine of not less than two thousand ringgit and has not received a free pardon in respect thereof;

H (vi) disqualified by reason of having been convicted under any law relating to offences in connection with elections to either House of Parliament or to the Dewan Undangan Negeri offence, or having in proceedings relating to such an offence been proved guilty of an act constituting such an offence; or

I (vii) voluntarily acquired citizenship of, or exercised rights of citizenship in, any country outside the Federation or has made a declaration of allegiance to any country outside the Federation.

[271] Articles 17(3), (4) and (5) deal with the removal of and the taking effect of certain disqualifications. Save for the position of a person who became a citizen, where it is specifically provided in art. 17(3) that such a person is not disqualified under cl. (1)(g) by reason only of anything done by him before he became a citizen, these articles do not provide for the removal of or the taking effect of the disqualification specified under art. 17(1)(g). Thus, in order to understand the purport and application of art. 17(1)(g), one must refer to the terms themselves.

[272] Article 17(1)(g) deals with where a person has voluntarily acquired citizenship of, or exercised rights of citizenship in, any country outside the Federation or has made a declaration of allegiance to any country outside the Federation. I am aware that the learned judge was not persuaded by the argument that once a Malaysian citizen acquires foreign citizenship, he is "forever disqualified" under art. 17(1)(g) from being a candidate for election or being qualified to be a member of the State Assembly, irrespective of a subsequent renunciation of that foreign citizenship. I am also aware that the learned judge read art. 17 as necessarily pertaining to pre-election qualifications which may only be adjudicated by the election court under art. 118 of the Federal Constitution. His Lordship came to this conclusion after comparing art. 17 with arts. 18 and 19 where the term "person" is used in art. 17 whereas the term "member" is deployed in arts. 18 and 19.

[273] With respect, I disagree. I find the reading afforded by the learned judge, that art. 17 deals with pre-election qualifications whereas arts. 18 and 19 deal with post-election disqualification is not one that is borne out by the terms of these provisions themselves. All these provisions, from arts. 16 to 19, deal with the matter of membership to the State Assembly, from qualification to disqualification, and decisions of the State Assembly as to disqualification and the cessation of qualification, and thereby cessation of membership. There are no other provisions save the same in arts. 16 and 17. In this respect, I find further support from the decision of Mohamed Azmi J in the first of the two *Fan Yew Teng* cases which were dealt with earlier, where His Lordship, dealing with the similar issue of disqualification under art. 48 of the Federal Constitution, clearly said that art. 48(1) applies to both pre-election and post-election disqualifications.

[274] That same reading and construction applies equally to the Sarawak State Constitution. Given that there are no provisions on qualifications and disqualifications after a citizen person is elected member as arts. 18 and 19 do not provide for qualification or disqualification, any issue relating to qualification and disqualification is necessarily resolved by reference to the same clauses of the State Constitution, namely arts. 16 and 17. These qualification provisions must now be read with modifications, and not, with respect to the learned judge, in the manner and with the distinction drawn along the lines of pre and post-election qualifications. That distinction is not found in arts. 16 and 17, leaving the distinction and thereby the rationale for the decision reached by the learned judge, tenuous and plainly erroneous.

[275] Further, such reading does not bring harmonious construction to the several provisions of the Sarawak State Constitution which are under scrutiny. In fact, the reading and construction by the learned judge would render the State Assembly not only incompetent but incapable to address a basic and fundamental question of membership of its members; a question which, beyond doubt, must always fall within the essential jurisdiction of any State Assembly to deal with and determine. The construction by the learned judge would, with respect, leave the State Assembly staffed by members who are not qualified but for some reason, such non-qualification is either not known or addressed until the member concerned has taken his or her seat in the State Assembly. As will be seen, the terms of arts. 16 and 17 or even 18 and 19 do not carry that purport nor are they capable of such construction.

[276] Turning then to the specific disqualification in these appeals, it is my respectful view that the use of the word "person" as opposed to "member" by no means mean that such use brings the meaning and intention ascribed by the learned judge. On its true and proper construction by way of a plain reading of art. 17(1)(g), and giving the provision its natural and ordinary meaning, a Malaysian citizen is unarguably, disqualified and excluded from qualifying where he or she has undertaken either one or more of the three acts mentioned therein. The language in art. 17(1)(g) is couched in the present and active tense, with no reference or qualification as to when or the time when any of the acts mentioned in cl. 1(g) were done or committed. The focus is on whether the disqualification exists, or still exists at the material time the question arose, and that would be when the ministerial motion was tabled and deliberated. The former would prevail in the disqualifications under cls. 1(a), (b) and (c) whereas the latter will apply to the disqualifications in cls. 1(d), (e) and (f).

[277] The disqualification under cl. 1(g) arises where the Malaysian citizen is also a citizen of another country. Article 17(1)(g) itself prescribes how that foreign citizenship may manifest. First, where a person has voluntarily acquired that foreign citizenship, that person is disqualified for membership. Second, where a person has exercised rights of citizenship in a country other than Malaysia, that person too, is disqualified. Third, where a person has made a declaration of allegiance to any country outside Malaysia, this person, like the earlier circumstanced person, is also disqualified.

[278] In my view, the disqualification in art. 17(1)(g) is not concerned only with the acquisition of foreign citizenship by a Malaysian citizen, it also disqualifies any Malaysian citizen who has exercised rights consistent with those afforded or enjoyed by citizens of another country. It further disqualifies any Malaysian citizen who has declared allegiance to a foreign country. I can understand the strict and uncompromising terms of art. 17(1)(g); in fact it comes as no surprise. We are dealing with elections and appointments of suitably qualified persons to the august body of the State

Assembly, a body which will make far-reaching decisions for the citizens of the Federation and particularly for those who reside in the State of Sarawak. This State Assembly, amongst others, is responsible for the onerous task of enacting laws which will regulate and affect the lives of the residents of the State of Sarawak. Such laws must necessarily be for the well-being, safety and security of these residents. Amongst such members charged with such onerous duty would be the Chief Minister, in the case of Sarawak, who will lead the State Government.

[279] The State Assembly and for that matter, Parliament cannot have as its members, those who have voluntarily acquired or exercised rights of citizenship in or to any country except Malaysia, or who have made declarations of allegiance to such other country. The allegiance must be to Malaysia and to Malaysia alone. Where any of her citizens choose to be a member of her Parliament or any of the State Assemblies, the qualification conditions in cl. 1(g) are unequivocal and uncompromising. The rights of citizenship, and the allegiance including a declaration of allegiance must be unquestionable and unqualified. Where her citizen member has committed or done any of the acts mentioned in cl. 1(g), such member is disqualified.

[280] The position of a foreigner or the person who is not a citizen, and how such a person is excluded from the operation of cl. 1(g), in my view, drives home the importance and significance of the requirement of unwavering loyalty and allegiance that is required of the citizen member. The learned judge had questioned the disparity, suggesting a favoured position given to such a newly acclaimed citizen as opposed to the position of an original citizen or a citizen from birth, deriving therein justification for the conclusion reached.

[281] With respect, this is erroneous. The terms in art. 17(3) are clear, and it is not the role of the court to find parity between the two categories of citizens who are deliberately contrasted by the express provisions of the Constitution itself.

[282] The strict construction of art. 17(1)(g) is further evident from the oath that each member of the State Assembly is mandatorily required to take under art. 22 of the Sarawak State Constitution, before exercising office or taking his place in the State Assembly:

> Oaths of Speaker, Deputy Speaker and members
>
> 22.The Speaker or the Deputy Speaker shall before exercising the functions of his office take and subscribe before the Yang di-Pertua Negeri the oath set out in Part III of the Schedule and every member of the Dewan Undangan Negeri shall before taking his seat to take and subscribe the said oath before the Speaker.

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Part III

Oath of Speaker/Deputy Speaker or Member of
Dewan Undangan Negeri

I,..., having been elected (or appointed) as a member (or Speaker/Deputy Speaker) of the Dewan Undangan Negeri of the State of Sarawak, do solemnly swear (or affirm) that I will faithfully discharge my duties as such to the best of my ability, that I will bear true faith and allegiance to the State of Sarawak and to the Federation and that I will **preserve, protect and defend the Constitution of the State of Sarawak and the Federal Constitution**.

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(emphasis added)

[283] In the terms of the oath, each member has sworn or affirmed to preserve, protect and defend the Sarawak State Constitution and the Federal Constitution. Each member has also sworn or affirmed that he will bear true faith and allegiance to the State of Sarawak and to Malaysia. In short, each member has sworn to put the State of Sarawak and the Nation of Malaysia above himself and all else.

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[284] Where that same person has also made the same declaration of allegiance, and in this regard, I do not believe it has to be a declaration of allegiance in exactly the same terms or even substantially the same terms, art. 17(1)(g) unequivocally disqualifies such a person. For the same reasons, a Malaysian citizen who has voluntarily acquired citizenship or who has exercised rights of citizenship of another country, is disqualified. In the case of the earlier, the voluntariness in the acquisition of foreign citizenship indicates the intent and State of mind of that citizen; that such a citizen has voluntarily opted to be a citizen of a second country.

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[285] In the present appeal, these are the undisputed facts. On 20 January 2010, the plaintiff voluntarily acquired Australian citizenship. On 4 April 2016, the plaintiff renounced his Australian citizenship.

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[286] The matter of citizenship in Australia is governed by specific legislation, namely the Australian Citizenship Act 2007 [No. 20, 2007]. The preamble to this Act makes very significant acknowledgment of the backdrop, purpose and intent against which the Act is enacted, and it reads as follows:

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Preamble

The Parliament recognises that Australian citizenship represents full and formal membership of the community of the Commonwealth of Australia, and Australian citizenship is a common bond, involving reciprocal rights and obligations, uniting all Australians, while respecting their diversity.

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The Parliament recognises that persons conferred Australian citizenship enjoy these rights and undertake to accept these obligations:

(a) by pledging loyalty to Australia and its people; and

(b) by sharing their democratic beliefs; and

(c) by respecting their rights and liberties; and

(d) by upholding and obeying the laws of Australia.

[287] Amongst others, the Act also sets out how a person may become an Australian citizen; it may be automatic or on application. Acquiring citizenship by application may be done in one of four ways:

(i) by descent subdivision A;

(ii) for those adopted in accordance with the Hague Convention on Intercountry Adoption or a bilateral arrangement Subdivision AA;

(iii) by conferral subdivision B;

(iv) resuming citizenship subdivision C.

[288] It is irrelevant under which category the plaintiff made his application for Australian citizenship save that it was granted. As an Australian citizen, the plaintiff would have enjoyed the rights of citizenship as mentioned in the preamble to the Act. At the same time, as an Australian citizen, the plaintiff also accepted the obligations mentioned in the preamble. One of the obligations undertaken was the mandatory pledge of commitment as set out in s. 26 of the Act. Such a pledge has to be made within the prescribed timelines before the application to become an Australian citizen is in fact approved see s. 26(2) and (3). The form of the pledge is as set out in s. 27. There are two forms of pledges prescribed in Schedule 1:

Form of pledge no. 1

From this time forward, under God,
I pledge my loyalty to Australia and its people,
Whose democratic beliefs I share,
Whose rights and liberties I respect, and
Whose laws I will uphold and obey.

Form of pledge no. 2

From this time forward,
I pledge my loyalty to Australia and its people,
Whose democratic beliefs I share,
Whose rights and liberties I respect, and
Whose laws I will uphold and obey.

[289] In either case, the pledge is one of *inter alia*, loyalty to Australia and its people. I further understand that Australia's election laws provide for compulsory voting for all eligible Australian citizens. Again, it cannot be disputed that this would extend to the plaintiff.

[290] With such overwhelming evidence, it is irrefutable that the plaintiff has ticked more than one of the three grounds of disqualification as provided under art. 17(1)(g). Under such circumstances, I can only conclude that the plaintiff does not in fact fulfill the qualifications under art. 16 as he suffers from a disqualification under art. 17(1)(g).

[291] I am of the further opinion that unlike the disqualifications in for example art. 17(1)(d) and (e) where art. 17(3) specifically provides for the removal or cessation of the disqualification, the disqualification in art. 17(1)(g) is not remediable. Since there are no provisions for the removal or cessation of the disqualification by for example a renunciation of the foreign citizenship or a positive act of depriving of citizenship by that foreign country, the disqualification applies regardless the moment any of the three manifestations or categories present. I cannot read into art. 17(1)(g) what is evidently not there and it would be wrong for me to even attempt to do so.

[292] The recent decision of the High Court of Australia sitting in its capacity as the court of disputed returns of *In the Matter of Questions referred to the court of Disputed Returns Pursuant to Section 376 of the Commonwealth Electoral Act 1918 (Cth) concerning Senator The Hon Matthew Canavan, Mr Scott Ludlum, Ms Larissa Waters, Senator Malcolm Roberts, The Hon Barnaby Joyce MP, Senator The Hon Fiona Nash and Senator Nick Zenophon* [2017] HCA 45 abundantly illustrates the significance of foreign citizenship in the case of persons standing for federal by-elections.

[293] In this decision rendered in a special case stated basis to the High Court of Australia pursuant to s. 18 of the Judiciary Act 1903 (Cth), the High Court carefully examined whether the existence of such citizenship disqualified certain of the referred persons as candidates, senators or members of the House of Representatives. The High Court found *inter alia* that the purpose of s. 44(i) of the Constitution of Australia was to ensure that a person who is under any acknowledgment of allegiance, obedience, or adherence to a foreign power, or is a subject or a citizen or entitled to the rights or privileges of a subject or a citizen of a foreign power shall be incapable of being chosen or of sitting as a senator or a member of the House of Representatives. This is despite Australia recognises dual citizenship; but when it comes to membership of the House of Representatives, the courts have been consistent in that persons holding dual citizenship are incapable of being chosen or of sitting as a member of the House of Representatives. Such a person has to show that "reasonable steps" have been taken to renounce their previous foreign citizenship. Otherwise, the person stands disqualified.

[294] Section 44(i) of the Constitution of Australia states:

> 44. Any person who:
>
> (i) is under any acknowledgment of allegiance, obedience, or adherence to a foreign power, or is a subject or a citizen or entitled to the rights or privileges of a subject or a citizen of a foreign power: or
>
> (ii) ...
>
> (v) ...
>
> shall be incapable of being chosen or of sitting as a senator or a member of the House of Representatives.

[295] At para. 29, Deane J writing this part of the judgment said: A

> 29. Section 44(i)'s whole purpose is to prevent persons with foreign loyalties or obligations from being members of the Australian Parliament.

[296] I understand that following this decision where there were several disqualifications, a new review of the whole section has since been instituted on 28 November 2017. B

[297] Be that as it may, while s. 44(i) of the Constitution is not in *pari materia* with art. 17(1)(g) and there does not appear to be an equivalent of or comparable art. 17(3) in the Australia context, I find that the purpose of s. 44(i) is not unlike that of art. 17(1)(g). Article 17(1)(g) seeks to render C disqualified any citizen who has foreign loyalties or obligations from being members of the State Assembly.

[298] Unlike the High Court of Australia, I am however, not prepared to undertake an exercise of examining whether the plaintiff had taken reasonable steps in respect of that foreign citizenship. There is not only a D distinct difference in our provisions with those of Australia but also that the factual matrix are significantly different. That exercise is quite unnecessary in the present facts.

[299] In the present appeals, it is a unique case of a Malaysian citizen who has voluntarily acquired citizenship of another country, enjoyed rights of E citizenship of such other country and has made a declaration of allegiance to that other country. The question is whether there is present a disqualification under art. 17(1)(g) rendering the citizen plaintiff no longer a qualified person under art. 16 for being a member of the State Assembly. I have already addressed and answered this poser in the earlier parts of this decision. F

[300] None of the authorities cited in these appeals including the cases considered by the High Court of Australia and the cases from India, deal with the same factual scenario or legal provision as presented in these appeals. None of the cases concern disqualification by reason of foreign citizenship or declaration of allegiance. Nevertheless, the approach of the High Court of G Australia in the above decision is instructive and of greater persuasion than the authorities cited from India which actually deal with disqualifications which are remediable.

[301] In that decision, the High Court was dealing with a foreign person who H had acquired Australian citizenship. Yet, the court took considerable measures and effort in examining the question of disqualification of such citizens under s. 44(i). If I may, and this is just for the sake of making my point clearer, were the plaintiff to stand for elections in Australia, he may be subjected to the same close scrutiny and tests as were undertaken by the I High Court in the above decision. It would appear that the Constitution of Australia does not have an equivalent provision to art. 17(3) of the Sarawak State Constitution when dealing with foreign citizens who have acquired Australian citizenship.

A **[302]** Finally, with respect, I must say that I am not persuaded by the decisions of the Supreme Court of India. Those cases do not deal with similar factual matrix or even similar legal provisions. In light of my observations on citizenship, those cases dealing with remediable disqualification by reason of conviction are not, with respect, of persuasive value.

B **[303]** In view of the stark absence of provisions for the cessation of disqualification by for example an act of renunciation of the foreign citizenship, I find that it would be inappropriate if not wrong for the court to read into art. 17(1)(g) such a removal of disqualification or even an exemption or cessation of such disqualification. The presence of express C removal or cessation of disqualification in art. 17(3) fortifies our view that the absence of such removal or cessation of disqualification is both deliberate and intended under the Sarawak State Constitution and the Federal Constitution.

D **[304]** I am, therefore, of the view that the renunciation of his Australian citizenship on 4 April 2016 has no impact whatsoever on the plaintiff's disqualification; the plaintiff remains disqualified by the plain terms of art. 17(1)(g) when he undertook the matters specified in art. 17(1)(g). What is material is that at the time the State Assembly deliberated on the ministerial motion, art. 17(1)(g) was available for its consideration. From the E terms of art. 17(1)(g), clearly, it was.

[305] This brings me back to the argument on the competence of the State Assembly to consider the matter of disqualification. The learned judge had concluded that art. 17(1)(g) concerned matters which are pre-election and are consequently not available for decision by the State Assembly.

F **[306]** For the reasons already explained above, I must disagree. The provisions of qualification, disqualification and the taking of decision on disqualification are matters which must be read as a whole. The whole purpose of these provisions is to ensure that only qualified persons as defined by art. 16 sit as members of the State Assembly. The ministerial motion G moved on 12 May 2017, taken and carried in the State Assembly is not a motion challenging the election of the plaintiff as member. It is a motion challenging the qualification of the plaintiff to remain as member; that he ceases to be a member. This is evident from the terms of the ministerial motion.

H **[307]** Where such a motion is moved and a decision has been taken, the court will not examine how the motion was carried, the debates and deliberations on the motion etc. Those are matters properly within the internal management and competence of the State Assembly and for which I art. 72(1) of the Federal Constitution applies to remind the court of the doctrine of parliamentary privileges.

[308] Parliament and the State Legislative Assembly of Sarawak always has jurisdiction and power to deal with the question of qualification and disqualification of any of its members. That question is necessarily a question concerning membership of the House or the State Assembly. I cannot imagine how an august House such as the State Legislative Assembly of Sarawak, one of the three organs of Government can ever be said to have no power or jurisdiction to deal with that vital question of qualification and membership. If that be the case, no State Assembly can ever regulate itself on such an essential matter as the qualification of its members. No knowingly unqualified or disqualified member of such an essential organ of Government should sit in the House or the State Assembly without the House or the State Assembly being empowered to deliberate and vote on the issue. The right to sit and be a member of the State Assembly is actually part and parcel of parliamentary privileges. It would be erroneous to acknowledge the principle of parliamentary privileges but not give respect to it by arguing that the court has jurisdiction to examine that privilege in the manner suggested by the plaintiff.

[309] The reading and construction that I have reached does not violate art. 118 of the Federal Constitution which reads as follows:

> Method Of Challenging Election
>
> [118] No election to the House of Representatives or to the Legislative Assembly of a State shall be called in question except by an election petition presented to the High Court having jurisdiction where the election was held.

[310] Article 118 deals with the challenge of elections. It does not deal with challenge of membership or qualification of members of either the House of Representatives or the Assemblies of any State. That is entirely within the purview of art. 53 in the case of parliamentary elections and art. 19 in the case of the Sarawak State Assembly.

[311] This becomes clear when we consider the purpose and ambit of the Elections Act 1958, Election Offences Act 1954 and the Regulations made thereunder.

[312] The Elections Act 1958 is an Act providing for elections to the Dewan Rakyat and to the Legislative Assemblies of the various States. Section 2 to the Act defines "election" to mean "a Parliamentary election or a State election, as the case may be". The term "State election" means "an election of a member to a Legislative Assembly".

[313] Under s. 2 of the Election Offences Act 1954, the term "election" "means an election held in accordance with the provisions of ay written law relating to the election of persons to be members of the Dewan Rakyat, a Legislative Assembly or a local authority." The 1954 Act is an Act to "prevent electoral offences and corrupt and illegal practices at elections; to provide for the establishment of enforcement teams and for matters

connected therewith; to provide for the appointment of election agents and to control election expenses; and to provide for election petitions." Part VI of the 1954 Act provide for the grounds for avoiding elections while Part VII deal with election petitions. Although an election can be avoided on the ground that a candidate was at the time of the election a person disqualified for election (s. 32), it is the election that is called in question and avoided; and that is where the election court steps in and for which purpose it is set up.

[314] From the terms of the ministerial motion, it is quite apparent that the election which returned the plaintiff is not questioned. What is questioned is the qualification(s) of the plaintiff as member of the State Assembly, whether he met the terms in art. 16 read with art. 17(1)(g), and whether he has ceased to qualify. Where he does not, then under art. 19(1), a decision on the qualification or membership may be taken by the State Assembly itself by its own members on its own members.

[315] The provisions of the Federal Constitution and the Sarawak State Constitution must be read harmoniously so that all the provisions may, as far as possible, be given their full effect. And, in this regard, it may be appreciated that it is the election court which has a more limited and thereby more restricted role to play. Its powers and jurisdiction are as prescribed under the laws enacted as compared to the jurisdiction of the State Assembly.

[316] Insofar as the matter of qualification of a member is concerned, Parliament or the State Assembly of Sarawak here, always has jurisdiction and power to deal with the issue or question. I cannot imagine how such an august House such as the State Assembly, can ever be said to be bereft of power or jurisdiction to deal with that question of qualification. If that be the case, no State Assembly can ever regulate itself on such an essential matter as the qualification of its members. Further, no knowingly unqualified or disqualified member of such an essential organ of Government should sit in the House or the State Assembly without the House or the State Assembly being empowered to question, deliberate and vote on the question. The right to sit and be a member of the State Assembly is actually part and parcel of parliamentary privileges.

[317] As alluded to earlier, art. 17 is not qualified by reference to when the disqualification arose. It simply states a state of condition; that one should not have undertaken any of the acts mentioned therein. Once any of the limitations or restrictions is breached, the disqualification kicks in. It is my further view that it is implicit in art. 17 that the disqualifications apply regardless when they arise so long as the terms are met. It would be wrong to read into art. 17 a condition which is obviously not there. And, if any question arises as to whether the plaintiff has ceased to so qualified, the question is decided not by any court or tribunal, including an election court. The use of the term "any" indicates that the ambit is wide. Where such question arises, art. 19(1), an enabling provision conferring jurisdiction on

the State Assembly, has clearly provided in mandatory terms that the decision of the State Assembly "shall be taken". Under the Standing Orders, such decisions are taken through motions such as the instant ministerial motion. Once deliberated and a vote has been taken, that decision is final and both the members and the State Assembly enjoy the parliamentary privilege of not having that decision scrutinised and questioned by any court of law.

[318] I do not see any need to question set alone examine the power or jurisdiction of the State Assembly to make the particular decision here. The ministerial motion was properly carried in and by the State Assembly; and the facts here do not present or warrant for an examination in the manner that was done in the decisions of *Teng Chang Khim v. Bardul Hisham*, *Teng Chang Khim v. Dato Raja Ideris*, *YAB Dato Zambry Abd Kadir & Ors v. YB Sivakumar Varatharaju* and *Dewan Undangan Negeri Selangor & Ors v. Mohd Hafarizam Harun*.

[319] It is incontrovertible that the ministerial motion was debated, deliberated and a vote was taken. The impugned decision is clearly one that was taken well within the walls and jurisdiction of the State Assembly and it is one that the State Assembly was and is entitled to take.

[320] I am aware that the Sarawak State Constitution does not have a provision like art. 50(2) of the Federal Constitution. That provision and art. 50(1) reads:

> (1) If a member of either House of Parliament becomes disqualified for membership of that House his seat shall become vacant.
>
> (2) If a person disqualified for being a member of the House of Representatives is elected to that House or if a person disqualified for being a member of the Senate is elected or appointed to the Senate or if an election or appointment to either House is contrary to art. 49, the election or appointment shall be void.

[321] This provision, whether in the same or like terms, may be found in all the Constitutions of the States in Malaysia except for the respective Constitutions of the States of Sabah and Sarawak. In my opinion, the presence of this provision in the Federal Constitution and other States, or the absence of such a provision in the Sarawak State Constitution, does not alter the conclusions and views expressed above. On their own, the terms of arts. 16 to 19 bear the construction and interpretation already expressed. Article 50(2) does not, in any event, vest on any particular body, be it the election court or the House or the State Assembly, by extension, the jurisdiction to deal with the particular infirmity. In my opinion, art. 50(2), like arts. 16 to 19 must be read contextually, dynamically and harmoniously.

[322] In my further opinion, art. 50(2) is also not read subject to art. 50(1). Article 50(1) provides for the tenure and vacancy of a seat when a member becomes disqualified; that when that happens, the seat shall become vacant. This provision exists in art. 18(2) and can be seen similarly worded in the Constitutions of the other States.

A **[323]** Article 50(2) on the other hand, seeks to deal with another condition, that is, a pre-existing disqualification which was for any number of reasons, not picked up or not dealt with and such a person is nevertheless elected. Article 50(2) states that such election shall be void. In other words, the person remains disqualified.

B **[324]** These are two disjunctive provisions dealing with different circumstances. Article 50(2) is also not intended to deal with a situation where a disqualification arises after election and where the returned candidate has been sworn in as member.

C **[325]** In my view, this clause confers further jurisdiction on the election court to call in question the election to the House or the State Assembly where the returned candidate or elected person, although his or her election may have been challenged, has nevertheless, already taken his seat in the State Assembly. In such case, the election "shall be void" and it is for the election court to make such a pronouncement. Such a provision takes on D board all the strict time and procedural provisions entailing an election petition, as are provided under the Election Offences Act 1954.

[326] This view is supported when we examine the old art. 50(3) which was repealed in 1963 *vide* Act 25/1963. That old art. 50(3) provided that "(3) If E the election of any person would or might be void under cl. (3) his nomination for the election shall be void."

[327] To my mind, the absence of such an enabling provision would mean that it is the State Assembly which then deals with the question. The presence of art. 50(2) does not derogate from the fact that it is the Sarawak State F Assembly which has jurisdiction to deal with the question of the plaintiff's qualification, or more specifically, the cessation of his qualification, in the manner as set out in the ministerial motion.

[328] From the facts and for the reasons already discussed above, the State Assembly here is entitled to the protection of parliamentary privilege as G provided under art. 72(1) of the Federal Constitution and the protection of art. 19(1) of the Sarawak State Constitution. In the words of Stephen J in *Bradlaugh v. Gossett*, the State Assembly " ... has the exclusive power of interpreting the statute, so far as the regulation of its own proceedings within its wall is concerned; and even if that interpretation be erroneous, the court H has no power to interfere with it, directly or indirectly." Stephen J further added:

> Grant, for the purposes of argument, that the resolution of the House and the Parliamentary Oaths Act contradict each other; how can we interfere without violating the principle just referred to? Surely the right of the I plaintiff to take the oath in question is "a matter arising concerning the House of Commons", to use the words of Blackstone ... It is part of the course of its own proceedings, "to use the words of Coleridge J and is

therefore subject to its exclusive jurisdiction." These authorities are so strong and simple that there may be some risk of weakening them in adding to them ...

[329] In the view of the writers of latest edition of *Erskine May on Parliamentary Practice* (23 edn), p. 46, the fact that an election petition may be presented to challenge an election "in no way supersedes the jurisdiction of the House in determining questions affecting the seats of its own members ..." It is my respectful view that the State Assembly clearly has jurisdiction to decide the matters moved in the ministerial motion as those matters evidently pertain to qualification, membership and seat of the plaintiff, a member of the State Assembly.

[330] I do not see any clear provisions nor can I infer, and I would be extremely slow to do so when reading the Federal Constitution and the Sarawak State Constitution, that the State Assembly is not entitled to or has no jurisdiction to question the qualification and the cessation of any qualification of the plaintiff, just because the disqualification arose before the plaintiff became its member. That question falls squarely within the ambit of "any question" in art. 19(1) which to me, carries connotations and suggestions of its broad and wide purport.

[331] Once again, I am reminded of the words of Mohamed Azmi J in *Fan Yew Teng*, that art. 19 gives the State Assembly the over-riding power to make decisions as to disqualification. I do not find any provision, whether in the Sarawak State Constitution or the Federal Constitution, to suggest that the power to decide on the question of disqualification is given to any other person or entity, including the election court.

[332] It is my firm view that the question posed in the ministerial motion is a question which inextricably and intrinsically concerns membership of the State Assembly. Such a question is well within the mandate, authority, competence and jurisdiction of the State Assembly to question and deliberate, regardless when it arose so long as it falls within the terms of art. 17; falling well within the application of *Lim Cho Hock* and the two *Fan Yew Teng* cases, as affirmed by the Federal Court recently in *Teng Chang Khim v. Badrul Hisham Abdullah*. More so, when the plaintiff is seeking to enjoy and continue to enjoy the privileges of membership of the State Assembly. The matters raised in the ministerial motion and the impugned decision reached are well and truly internal management matters within the business of the State Assembly, taken not even outside its walls but at one of its regular sittings. Consequently, the impugned decision and the State Assembly as well as its members, enjoy parliamentary privilege rendering the matters therefore, not justiciable. To say otherwise, that the courts may scrutinise the ministerial motion and the impugned decision, leads necessarily to an adverse impact on the essential business of the State Assembly.

A

Conclusion

[333] For all the reasons set out above, I find that there are serious misapprehensions of the law and erroneous application of the law to the facts by the learned judge. I am therefore compelled to exercise the appellate powers of intervention and allow the appeals and set aside the decision of the learned judge. The appellants' application to strike out the plaintiff's originating summons ought to have been allowed.

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[334] Finally, in the light of the myriad of issues raised in these appeals which I am convinced are all matters of public interest, no costs ought to be allowed; and I so order.

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